FILED

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No.________________ OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

William N. Johnson III and Emma G. Johnson - *PETITIONERS*

v.

Internal Revenue Service, et al. - *RESPONDENTS*

On Petition For Writ Of Certiorari To
The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners - Pro Se

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112 pp

QUESTION PRESENTED

- PREFACE -

The question issue presented to this Court is a progressive one for a Constitutional property right: for if the first assumed Constitutional right is incorrect, then the second assumed Constitutional right is meaningless.

First Constitutional Right: Assumed

In an Administrative and/or Judicial Proceeding, before a government authority, is the right to "Self Representation" protected under the umbrella of the United States Constitution's Fifth Amendment "DUE PROCESS CLAUSE" for Federal procedures and the Fourteenth Amendment "DUE PROCESS CLAUSE" for State procedures?

Second Constitutional Right: Assumed

If the Constitution does protect the right of a person to "Self Representation", for both Federal and State procedures, then is it a deprivation of that protected right when a government authority is bias and/or acts substantially bias or unfairly, or criminally to that person for opting to utilize the "Sefl Representation" right?

PARTIES LIST

PETITIONERS - Pro Se: William Nick Johnson III
(Plaintiffs/Appellants)

Emma Gene (Hartmann) Johnson

vs.

RESPONDENTS: Internal Revenue Service (IRS)
(Defendants/Appellees)
Department of the Treasury
Respondent person for IRS
unknow

Margaret M. Richardson
Commissioner - IRS *

Michael L. Killfoil
Director - IRS *

Sandra L. Wise
Problem Resolution
Specialist - IRS *

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* - Is or was position with IRS - current status unknow as of the filing of this "PETITION FOR WRIT OF CERTIORARI".

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United States Court of Appeals for the Fifth Circuit

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U.S. Magistrate Court for the Western District of Texas - Austin Division

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Federal District Judge James R. Nowlin

APPENDIX - J: "COMPLAINT" *
Filed - December 28, 1995 by:
William N. Johnson III and
Emma G. Johnson: Plaintiffs/Petitioners

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* - A complete typeset of the Petitioners initial "COMPLAINT" is provided (excluding all referenced exhibits), as allowed by Rule 14(1)(i)(vi), due to the major role it played in the judicial proceeding.

Index to Appendix: cont.

APPENDIX - K: "REPLY BRIEF OF APPELLANTS"**
Relevant Document - Federal Appeal Court
Filed - Febuary 6, 1998 by:
William N. Johnson III and
Emma G. Johnson: Plaintiffs/Appellants with:
United States Court of Appeals for the Fifth Circuit

APPENDIX - L: "STATUTE" - Federal Court Jurisdiction
TITLE 28, UNITED STATES CODE,
§ 1346 (a)(1) United States as defendant.
and
§ 1357 Injuries under Federal laws.

** - A semi-complete typeset of the Petitioners "REPLY BRIEF OF APPELLANTS" filed in their appeal is provided, as allowed by Rule 14(1)(i)(vi), due to the major role it plays in relationship to the question presented to this Court.

TABLE OF CITED AUTHORITIES

CASE:..................................	CITE:............	PAGE:
Crowell v. Benson	285 U.S. 22, 87	20
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IN THE
SUPREME COURT OF THE UNITES STATES

OCTOBER TERM, 1998

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

FEDERAL COURT:

The opinion of the United States Court of Appeals for the 5th Circuit appears at Appendix: "A" to the petition and is unpublished.

The opinion of the United States District Court for the Western District of Texas - Austin Division (based on U.S. Magistrate Judge's "Report and Recommendation") appears at Appendix: "B" to the petition and is unpublished - as far as Petitioners are aware.

The "Report and Recommendation" issued by the United States Magistrate Judge appears at Appendix: "D" to the petition and is unpublished - as far as Petitioners are aware.

JURISDICTION

FEDERAL COURT:

The date on which the United States Court of Appeals for the 5th Circuit decided Petitioners' case was May 28, 1998.

A timely petition for rehearing was denied by the United States Court of Appeals for the 5th Circuit on the following date: August 03, 1998, and a copy (typeset) of the order denying rehearing appears at Appendix: "E".

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL PROVISIONS

U.S. Const. Amendment V - Due Process

STATUTES

28 U.S.C. §1346(a)(1) - United States as defendant
See Appendix - L

28 U.S.C. §1357 - Injuries under Federal Laws
See Appendix - L

28 U.S.C. §1654 - Appearance personally or by counsel
See Appendix - L

RULES

Federal Rules of Civil Procedure
  Rule 1. SCOPE AND PURPOSE OF RULES
  Rule 4. SUMMONS

ENCYCLOPEDIAS

Black's Law Dictionary 5th Ed.

STATEMENT OF THE CASE

QUESTION ISSUE - "SELF REPRESENTATION" - CONSTITUTIONAL DUE PROCESS RIGHT -

INDIVIDUAL RIGHT BEFORE GOVERNMENT AUTHORITY TO "SELF REPRESENTATION":

The questions that this Court must first address in Petitioners case can be attributed to most procedures before any government authority, be it state or federal, but in this case the government authorities are the IRS, the U.S. Attorney, and the Federal Courts (District and Circuit Appeal Courts).

Many government agencies (such as the IRS) allow individuals to represent themselves in dealing with them. This is a fact which Petitioners feel this Court will not have a problem in accepting. The IRS publicizes this fact in many of its publications. The questions then pertaining to the Constitution's "DUE PROCESS CLAUSES" of both the Fifth and Fourteenth Amendments are:

(1) Whether the Administrative and/or Judicial Procedures can and/or should be different when the individual/taxpayer is represented by an attorney or themselves for being fair, legal, and ethical - in accordance with all the rules governing such procedures?

(2) Then if the person chooses to represent him or herself then what protections do they have against proceedings that are substantially bias, or unfair, or even criminal thus causing them to suffer a Deprivation Of Procedural Due Process Rights?

There is statute authority giving a person the right to "Self Representation" before any Court in a judicial proceeding. The statute is:

> 28 USC §1654. Appearance personally or by counsel. In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

In *Turner v. American Bar Asso.* 407 F Supp, 451. (DC Tex. - 1975) the Court found that 28 USCS §1654 only allows for two types of representation:

(1) by attorney admitted to practice of law by government regulatory body, and

(2) by person representing himself.

Then in *People v. McIntyre* 36 NY 2d 10. NYS 2d 837, NE 2d 322 (NY - 1974) that Court found this right to be Constitutional by finding a person's right to defend pro se is deeply ingrained in our common law, and constitutional dimension of right to defend pro se is evidenced by fact that it has been sustained by various sections of federal constitution, and additionally, right of self-representation was codified in Judiciary Act of 1789 and is presently contained in 28 USCS §1654;

The purpose for this right was addressed in *Soto v. United States* 369 F.Supp 232, (DC Pa. - 1973) when the Court found the right to proceed pro se derives from belief that respect for human dignity is best served by respect for individual freedom of choice.

Petitioners strongly feel this is a right which should not be taken lightly or allowed to be damaged by the actions of any government authority - especially a Federal authority - no matter which authority it may be.

BEGINNING CASE HISTORY:

IRS Audit.

1 - In May 1988 Petitioners were notified that their 1986 "Personal Income Tax Return" (PITR), which they personally prepared, had been selected for an audit due to certain deductions taken. *Ref.* Appendix - "COMPLAINT": J-5 (Fact 3)

> NOTE: The Petitioners' previous PITR filed for 1984 and 1985 tax years had not been selected by the IRS for audit even though the same deductible questions were present on those returns. Petitioners believed then, as now, that the reason the IRS would not review the 1984 and 1985 PITR's was the fact that those returns had been prepared by the accounting firm of Price Waterhouse.

2 - Due to the amount (less than $400) in question for the audit, Petitioners chose to represent themselves before the IRS in addressing this matter - a material fact pertinent to the question posed to the Court.

3 - The IRS aduit issue lasted over 2½ years with the Petitioners devoting a significant amount of time and money establishing the methods used in calculating the initial legal deductions taken - for the IRS' acceptance. It became apparent to Petitioners after a year that the IRS was not interested in just resolving the initial deduction issues. For once they had been verified for being legal deductions taken, by Petitioners, the IRS continued to look at other tax issues which were not subject to the audit procedure.

4 - Due to the IRS being unable to establish any wrongful actions by Petitioner, the IRS continued to prolong the audit procedure by rejecting most of Petitioners methods and grounds for additional deductions.

5 - Only after Petitioners filed a "Petition" with the U.S. Tax Court and the case was scheduled for trial did the IRS begin to accept all Petitioners 1986 initial and additional deductions as being justified, but the seemingly change of attitude was not one of goodwill - as Petitioners would soon learn.

FEDERAL ABUSES AGAINST PETITIONERS:

Administrative Procedures.

6 - An IRS tactic used to force taxpayers who represent themselves into agreeing to less than they are rightfully due occurred during the time Petitioners were negotiating the agreed settlement to the 1986 audit - prior to the Tax Court trial. Both the IRS and the "Self Represented" taxpayer verbally agreed to an out of court settlement, with the IRS stating the necessary documents would be prepared as agreed to by them; therefore, settling the case prior to trial - a very important issue to any taxpayer who is not an Attorney or Accountant. The taxpayer later learns that the IRS prepared document is not what was agreed

to, and is faced with the difficult choice of either giving in to the IRS' benefiting tactic or continuing to trial. In Petitioners' case the choice was easy: reject the agreement and proceed to trial. At which point the IRS did a "180" - choosing to keep that original agreement, so the case would not go to trial.

> NOTE: It is very important to note here what the result of that "FINAL" out of court agreement was. The initial audit issue deductions claimed by Petitioners for 1986 were all approved by the IRS, plus all additional deductions claimed in the audit were also accepted by the IRS. Instead of paying additional taxes due to the IRS' initial audit, Petitioners received a refund of $671.00 for the 2½ years of utilizing their right of "Self Representation". Now, Petitioners have seen and heard of this same IRS tactic with other "Self Representing" taxpayers.

SPECIAL NOTE:

Petitioners understand the need for brevity in preparing this document, but due to the issue of the question and the results of the actions taken by both the Petitioners and the IRS, Petitioners feel it is very important to establish a reason for why the Defendant would act the way Petitioners propose they did. Plus, there is also the need for Petitioners to defend their character and show they are not as depicted by the Federal Magistrate Judge in his "REPORT & RECOMMENDATION" (MJ/R&R) that:

> "..., they have declined to do so for their own cryptic reasons." *Ref.* Appendix - MJ/R&R: D-9

and:

> "They do not claim harassment, only lack of their desired response to their tax problems. Plaintiffs' claims against Wise are clearly frivolous and harassing; especially in light of Plaintiffs' consistent failure to file their income tax returns." *Ref.* Appendix - MJ/R&R: D-18

Petitioners feel that due to points #1 through #5 and especially #6 it should be clear to this Court that Petitioners did not greatly benefit from the IRS audit. The fact is: neither the IRS nor the Petitioners benefited from that audit procedure.

7 - Petitioners feel that something had to initiate the IRS'[1] contempt and actions toward Petitioners/Taxpayers over the past years and the auditing of Petitioners 1986 "JOINT" PITR final outcome was the stimulus. This is not as far reaching an assumption now as it would have been a few years back.

8 - IRS falsifying a document for the purpose of appearing to comply with its rules for actions taken against Petitioners - a criminal act if found to have been done intentionally.

> NOTE: Petitioners are unsure, but do feel they should not openly address this point issue before this Court at this time, but strongly feel it should be stated to the Court in reference to the question presented. Petitioners state this point with the clear knowledge and understanding of the possible recourse for misrepresenting a fact/matter/issue to this and/or any other Court.

9 - The fact that the IRS did not take any action between February 16, 1994 and December 28, 1995 (filing of Petitioners' "COMPLAINT") to address and/or remove the illegal taxing file under Petitioner Mrs. Johnson's SSN for the tax year 1988. This is clearly not proper Administrative Procedure, and if done intentionally (as the evidence has supported) then it was a clear Deprivation Of Procedural Due Process - violation of Petitioners' Constitutional right.

> NOTE: The case file addressed here was justified up until the time prior to the IRS receiving the Petitioners' "JOINT" PITR for 1988 in February 1994. After that date when the said file was acted on for any type of collection it became an illegal file. This is a very pertinent issue to Petitioners' case which both the IRS and the Federal District Court should have addressed prior to their final actions, and the Appeal Court also seemed to not address, for establishing Petitioners grounds for Federal Court Jurisdiction.

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[1] Designation IRS to include one or more Defendants and/or other IRS employee(s).

10 - The IRS committing the illegal and unconstitutional act of "Double Taxation" against Petitioners for the income tax on Petitioner Mrs. Johnson's 1988 reported income, for there was not law, statute, or other legal authority justifying what the IRS did in regard to this issue in this case, after the time period stated in the NOTE for #9 above. *Ref.* Appendix - MJ/R&R: D-6/7 and D-14

> NOTE: The actual "Double Taxation" act existed from August 13, 1994 until January 1996.

11 - A continuation of #10's "Double Taxation" issue is the point that Petitioners were told on October 5, 1994, by IRS employee, Ms. Hill, that the IRS was aware of the issue and had been referred to the IRS Problem Resolution area for correcting the day before - October 4, 1994.

> NOTE: The issue referenced by Ms. Hill was not the "Double Taxation" per se, but the two case files for the year 1988 addressing the same "X" income item for Petitioner Mrs. Johnson. Where under the Petitioners' "JOINT" PITR the exact same "X" income item was being used by the IRS in the second case file under Petitioner Mrs. Johnson's SSN. Thus, in the second case the IRS had transferred overpaid/refund from Petitioners "JOINT" 1993 PITR (mailed/filed on August 13, 1994) to Mrs. Johnson's 1988 case file for payment on that account's tax deficiency. *Ref.* Appendix - "COMPLAINT": J-3/4 (Parts 1/2/3)

12 - The IRS filing an illegal (under the circustances) lien against Petitioner Mrs. Johnson in August 1995, for an IRS claimed tax debt which Petitioners did not owe at the time.

> NOTE: Petitioners did not receive any notification from the IRS that said lien had been filed, as required by the IRS Code. Petitioners first learned of this matter on October 23, 1995. See #15.
>
> *Ref.* Appendix - "COMPLAINT": J-9 (Fact 18/19/20)

13 - The IRS letting the illegal lien (#12) remain actively on file for over 3 years after Petitioners claimed and proved it was not legal when initially filed.

13 - cont.

NOTE: As of June 1, 1998, the lien was still on file. No notice has been received from the IRS stating lien has been removed.

14 - The IRS illegally levying Petitioner Mrs. Johnson's wages for December 1995 as collection for the illegal lien stated in #12.

NOTE: The IRS garnishment of Petitioner Mrs. Johnson's December 1995 monthly wages amounted to 74% of her take home pay.

15 - The IRS rejecting Petitioners request for a meeting/hearing prior to the taking of Petitioner Mrs. Johnson's wages, for the sole purpose of stopping the wrongful IRS action against Petitioners.

NOTE: Petitioner Mr. Johnson made this request to Defendant Ms. Wise on October 23, 1995 during a phone conversation addressing the illegal act stated in #13 & 14. Also, during this phone conversation Petitioner Mr. Johnson informed Ms. Wise of his then current medical condition, but she did not comment on the matter.

16 - During the October 23, 1995 phone conversation stated in #15: Petitioner Mr. Johnson told Defendant Ms. Wise that if need be Petitioners would take legal action to stop the illegal actions of the IRS toward Petitioner Mrs. Johnson. Ms. Wise informed Mr. Johnson that it was his right to do that, and to go ahead. But, it would do no good for many others had tried and all had failed.

17 - On November 1, 1995 Petitioner Mr. Johnson received a phone call from Defendant Ms. Sandra L. Wise. Ms. Wise told Mr. Johnson that she now realized that in fact we (Petitioners) had indeed filed a 1988 J-PITR and in doing that the IRS file on Petitioner Mrs. Johnson for the tax year 1988 should have been closed. With that said, Ms. Wise told Mr. Johnson she would take care of the matter and would put a stop on the levying of Mrs. Johnson's wages, and it would be done by November 20th.

NOTE: Now the question will be asked. After the November 20th date why did Petitioners not tried again to

17 - Note: cont.

contact the IRS and inquire about the status of the lien on Petitioner Mrs. Johnson: prior to suffering the injury of the garnishing of Mrs. Johnson's wages?

(1) Petitioners understood that the IRS would divide the levy total amount of $1,701.30 into two equal deductions - one for December 1995 and the other for January 1996. Therefore, the injury would be substantial, but not overwhelming. Petitioners had no way of knowing that the IRS would take the total amount at one time - again 74% of Mrs. Johnson's December take home wages.

(2) The Petitioners had tried many times to correct many injustice wrongs done them by the IRS with no success, there was no reason to believe another try would be any different, especially in light of the fact of what they were told on November 1st by Ms. Wise. Therefore, Petitioners continued to prepare to take the only action they felt remaining under the circumstances - file a Federal Civil Lawsuit prior to January 1, 1996, and seek a Temporary Restraining Order (TRO) for relief. Petitioners did file their "COMPLAINT" with a "TRO" on December 28, 1995.

18 - In preparing to file a lawsuit in the Federal District Court, Petitioners obtained from the Federal Court Clerk's office printed Federal District Court notes and directions on what to do in taking such action. Petitioners also purchased many legal text books for providing assistance and guidance as well.

NOTE: Petitioners took the matter of filing a lawsuit then, as well as now, very serious. As proof of this is the fact that Petitioner Mr. Johnson has suffered great physical hardship and injury due to this case, and will never fully recover to his original physical condition prior to this journey. Only time will tell just how much this case will cost both Petitioners. But even with the price this journey has cost, it is worth it for one good reason. It was the right thing to do - based on the Petitioners dealing for the past 10 year.

19 - In preparing to serve the "COMPLAINT" and the required "SUMMONS" on all the Defendants and the required other Federal Authorities: Petitioners phoned each and requested they to provide assistance in what needed to be done so to comply with that requirement. Not one of the contacts hinted to the affect that what they told us was not correct and/or proper due to the importance of the matter. Petitioners followed all the instruction given them based on the said phone calls and the Federal District Court's provided outline. *Ref.* Appendix - MJ/R&R: D-9/10

20 - One major issue of this case is the fact that Petitioners named the IRS as a Defendant. The main fact addressing this issue is this: Petitioners followed the Federal District Court's guidelines as best they could in drafting their "COMPLAINT", and in doing so named the IRS as a Defendant. The guideline outline (they received) did more than just support such an act, it moved for naming the IRS as a Defendant. See #6 below.
Ref. Appendix - JM/R&R: D-1 & D-8/9/10

DOCUMENT TITLE: NOTICE TO PRO SE FILERS
SUB-TITLE: FILING A CIVIL COMPLAINT

> A complaint is a formal written statement in which the plaintiff presents the facts as he/she believes them to be and demands the relief to which the plaintiff feels he/she is entitled. The following is a list of the documents required to be presented to the Clerk for filing a complaint: NOTE: Items 1 - 4, and 7 omitted.

5. If the United States is a defendant, service is required on the U.S. Attorney and the Attorney General. Accordingly, one additional copy of the summons and complaint is required for each.

6. If a federal agency is a defendant, (e.g., U.S. Air Force, I.R.S.., ect.) service is required on the agency, the U.S. Attorney, and the Attorney General. One copy of the summons and complaint is required for each.

Judicial Procedures.

21 - As stated in #17 NOTE: (2) Petitioners filed their "COMPLAINT" which contained their "Temporary Restraining Order" ("TRO") (to stop the IRS from illegal taking 74% of Petitioner Mrs. Johnson's December wages) in the Federal District Court on December 28, 1995.

See "TRO": *Ref.* Appendix - "COMPLAINT": J-22 (Part 5)

22 - The Fed. Dist. Court Judge issued an "ORDER" dening the "TRO" on December 29, 1995. Reason given was:

> "Plaintiffs' motion fails to establish that an immediate and irreparable injury will result from a denial of the Temporary Restraining Order. Furthermore, Plaintiffs, acting pro se, failed to certify the efforts which have been made to give notice and the reasons why notice should not be required."

> NOTE: Petitioners did state a justifable reason for warranting at least a Hearing before the Court prior to the IRS causing Petitioners additional possible injury.

> QUESTION. Was the Court required to have held a hearing prior to denying the "TRO" as required under the DUE PROCESS CLAUSE of the 5th Amendment? If so, then was the Court's action possibly due to the fact that Petitioners were representing themselves?

23 - Defendants filed their "ANSWER" on March 9, 1996.

> ISSUE. Failure of Defense to abide by the FRCP Rule 10(a) when the "ANSWER" did not contain the - required - Case Number. The point here is the Court took no action.
>
> NOTE: The Defendants filed many more documents with either the case number missing or incomplete. Not once did the Court address this issue. Petitioners do not claim that this issue served them any type of harm, but only question the non-response by the Court, and wonder if the Court would have acted differently if the Petitioners had failed to comply with this said FRCP requirement.

24 - In the Defendants' "ANSWER" their response to the Petitioners statement of Fact 20 notes that Petitioner Mr. Johnson requested a meeting/hearing prior to the IRS pursuing the levy of Petitioner Mrs. Johnson's wages. See *Ref.* Appendix - "COMPLAINT": J-10/11 (Fact 20).

> NOTE: This note taken from Fact 20 on Appendix page J-11. "... I [Mr. Johnson] requested the opportunity to meet with her or someone in order to resolve this matter without having to file a law suit. Ms. Wise flatly informed me that there was nothing she could do for me. She (SLW) had done all that she could, and if I wanted to file a law suit then that was my right, but it would do no good - we had no chance of winning - for many other taxpayers had filed law suits and did not win."

The Defendants response to this statement is as follows:

> "3 (Fact 20) Defendants deny the allegations in pargraph 3 (Fact 20) of Plaintiffs' Complaint because the allegations are not accurate with respect to what was said during the conversation between Mr. Johnson and Ms. Wise."

SPECIAL NOTE:

This legal issue (a request for a fair hearing prior to the Government taking such action as stated) alone demands the Court hold a hearing to determine if in fact there had been a request made by Mr. Johnson for trying to prevent the IRS from both Petitioners needless injury and/or harm. The Federal District Court Judge nor the Federal Appeal Court Judges felt the need to resolve this issue prior to dismissing Petitioners' case for lack of Jurisdiction.

25 - On April 17, 1996 the Fed. Dist. Judge issued an "ORDER" denying Petitioners' non - "Request For More Definite Statement". In that order the Judge made this statement directed to the Petitioners acting *Pro Se*.

> "The Court also takes the opportunity to advise Plaintiffs that they must be diligent in their prosecution of this matter during its pendency in this Court. Plaintiffs pro se status does not entitle them to more lenient scrutiny, and

25 - cont.

the Fifth Circuit has stated that 'the right of self-representation does not exempt a party from compliance with relevant rules of procedural and substantive law.' *Dersh v. Derozier*, 851 F.2d 1509, 1512 (5th Cir. 1988)."

NOTE: At the time the Petitioners received this warning from the Court they were still very intense in trying to learn what all would be required of then in pursuing their case. But as time went by, Petitioners begain to realize that the Court was acting bias - favoring the Defendants.

26 - On May 31, 1996 the Defendants and the Plaintiffs filed a "Joint Stipulation For One Week Extension Of Rule 26 Disclosures" with the Court, thus begining the Discovery phase of the proceedings.

27 - On June 4, 1996 Petitioners' filed their required "List of Expected Non-Expert And Expert Witnesses, And Proposed Exhibits At Trial".

28 - On July 8, 1996 the Defendants filed their "Initial Disclosures".

29 - On August 19, 1996 Petitioners filed a motion with the Court requesting to extend the deadline date for completing discovery from Aug. 30th to Oct. 25th. The Defendants did not file a response to the motion.

30 - The next day (Aug. 20th) Petitioners mailed their first set of "Interrogatories" to the all the Defendants, service through their counsel. DUE DATE: September 23rd.

NOTE: Later Petitioners learned that the Defense U.S. Atty. did not submit the interrogatories to any Defendants. Also Note - no Defendants moved the Court for any complaint to stop Plaintiffs' discovery operation, until after theses "Interrogatories" required responses had past their deadline due date of Sep. 23rd.

31 - On September 4, 1996 Petitioners continued their discovery operation by mailing their set of "Admissions" to all the Defendants.

Special Note:

While Petitioner Mr. Johnson was continuing to address the discovery operation many attempts had been made to contact the U.S. Atty. (who was located in Dallas, Tx.) representing the Defendants by both mail and phone. The first contact oocured on September 24, 1996, when Petitioner Mr. Johnson did make phone contact with the U.S. Atty.

The purpose of the phone call was to find out the status of the "Interrogatories" responses, which were past due. Petitioners did not wish to have the Court get involed if is could be avoided. The U.S. Atty. responded to Mr. Johnson inquiry by making this statement: "We did not believe you'll were serious about pursuing the lawsuit." Due to this comment, Mr. Johnson then ask if he now believed that we [Plaintiffs] were serious about pursuing the lawsuit, where upon the U.S. Att. said Yes!

Both Petitioners/Plaintiffs were very up set because of the government counsel's attitude and performance.

32 - On September 26, 1996 the Defendants U.S. Atty. filed two (2) motions. The first was a motion that the Defense Atty. claimed would have first been filed 5½ months earlier, but was only filed now due to the Petitioner Mr. Johnson's phone call of two days earlier, as stated above. The motion was "Defendants' Motion To Dismiss And Alternative Motion For Summary Judgment". The second motion filed was "Defendants' Motion For Protective Order Staying Discovery"

SPECIAL NOTE:

The timeliness of the U.S. Atty's actions in this case were nowhere near what the Fed. Dist. Judge warned Petitioners acting *Pro SE* must abide by. See #25 on page 13. Also, Petitioners were to learn that the Court would not abide by its own imposed timeliness responsiveness

33 - Because of the failure of the Defendants to properly treat Petitioners case in a timely way, and the real hardship the case was causing both Petitioners: Petitioners decided to continue pursuing their discovery operation, until either completed or the Court ordered them to stop.

34 - Every time the Defense failed to comply with Petitioners discovery methods the Petitioners would draft and file a motion for a sanction and/or for a contempt of court. From Sep. 27th through Nov. 12th Petitioners filed four (4) such motions. It is important to note when the Court issued a stay on all discovery in the case. That day was January 3, 1997 - over three (3) monthes after the Defense filed its motion for a stay. So much for the Court being timely in administrating the case.

SPECIAL NOTE:

To better help this Court understand the true bias the Petitioners had to face over the many years, first in dealing with the IRS, and second with the U.S. Atty. - representing the Defendants, and then the Federal Court Judge, the next two events will beg this Court to grant Petitioners' Cert. for the need of this all powerful Court to address the abuses any person may face from a government authority just because that person chooses to or is financial forced to utilize their right to "Self Repsrentation".

35 - The first event: Petitioners followed to the letter of the FRCP rule governing this issue the required procedure for notification by Federal Court issued Subpoenas, served by a paid Process Server on three government individuals to be deposed. The U.S. Atty informed Petitioner Mr. Johnson that he was not going to allow any of the served individuals appear for their video depositions. The U.S. Atty. took this action without any Federal Judicial Court authority. Petitioners are not aware that the U.S. Atty had such authority to stop a properly legal served Subpoena without first going through the Court.

> NOTE: Petitioners informed the Fed. Dist. Court of this action when they filed a motion for Sanctions and Contempt of Court. The Court's response: it dismissed many of the Petitioners motions (this was one) as moot.

36 - The second event: Petitioners notified and scheduled their "Video Deposition Of the Defendant Ms. Richardson in Washington, D.C. at a specified place and time. Petitioners also notified the Court of their plans to travel to Washington, D.C. for this purpose in advance, so if the Court was going to issue an order stopping all discovery it might do so prior to the Petitioners leaving for D.C. The Court did not rule on the Defendants' motion for a stay prior to the Petitioners leaving on October 20, 1996. The fact is that the Court did not rule on the stay motion until January 3, 1997, at which time the Defendants' motion was grainted.

> NOTE: No one appeared for this scheduled deposition.
>
> NOTE: If the Fed. Dist. Court Judge had any real concerns about the proper administation of a *Pro Se* litigant before his Court, then he would have acted differently.

37 - The Federal Majistrate Judge issued an order on December 30, 1996 scheduling the first and only hearing held in this case. That order stated:

> "It is HEREBY ORDERED that the Parties appear for a hearing on all pending motions on January 21, 1997, at 2:00 P.M." *Ref.* Appendix - "ORDER": F-1
>
> NOTE: Here is a list of the motions scheduled for the hearing.

1) Defendants' Motion To Dismiss And Alternative Motion For Summary Judgment.

2) Defendants' Motion For Protective Order Staying Discovery.

3) Plaintiff's Motion For Sanctions.

4) Plaintiff's Motion For Sanctions For Failure Of Defendant To Attend At Own Deposition.

5) Plaintiffs' AMENDED - Motion For Sanctions: Requesting A Court Hearing On This Issue.

6) Plaintiff's Motion For Contempt Of Court And Sanctions Against Defense Attorney Andrew L. Sobotka For Stopping Witnesses To Attend Their Subpoenaed Scheduled Deposition And Failing To Produce Documents.

7) Plaintiff's Motion For Sanctions Against Defendant Michael L. Killfoil And Defense Attorney Andrew L. Sobotka For Not Attending Scheduled Deposition And Failing To Produce Documents.

SPECIAL NOTE:

"PARTIES" - construed:

Words "the parties" mean parties in interest and exclude agents and attorneys in fact.

Heiskell v. Mozie 82 F.2d 861, (App. DC - 1936)

Reference in 28 USCS §1654 to "the parties" applies only to parties in interest, real beneficial owners of the claims asserted in suit.

Strong Delivery Ministry Asso. v. Board of Appeals
543 F2d 32. (CA7 - 1976)

In spite of the fact that the Court order stated "that the parties appear", the only parties to appear were the Petitioners. No Defendant were present at the hearing, which is not in tune with the word "Parties" construed in the two cases above.

Petitioners feel that the reason for no Defendants appearing at the hearing was so no issues could be raised before the Court which would force a response that could be considered possibly criminal, and thus later be used to start an inquiry into other acts. For example: the criminal issue of perjury. *Ref.* #24 on page 13, and #31. There are many other acts which Petitioners feel should be investigated by the proper government authority.

38 - On January 3, 1997 the Magistrate Judge issue an "ORDER" instructing Petitioners to "Replead COMPLAINT" with specificity to statute or portion of U.S. Constitution under which the cause of action is brought, and the Plaintiffs must do this by the Jan. 21, 1997 2:00 p.m. scheduled hearing, or the Court will order the Plaintiffs cause of action DISMISSED WITHOUT PREJUDICE.

39 - The first issue point is simple. At the time this order was issued the Magistrate Judge did not have the authority to decide the final outcome of the case. For nether the Defendants nor the Petitioners had agreed to the case being placed on the Magistrate Judge's calendar. So, the question is this: would the Magistrate Judge had issued the same order if Petitioners had been represented by counsel? If you are not sure, then ask yourself what would have been a reason for the order?

> NOTE: Petitioners find it very interesting the timing of this order and the one scheduling the "HEARING", just 4 days earlier. Especially in light of the fact that no Defendants were in attendance, and the Magistrate Judge Court would not let the Petitioners present any evidence in support of their claimed jurisdictional statute 28 U.S.C. §1346(a)(1).

40 - When all the questionable issues are considered together, can any person really believe that the Petitioners were treated both fairly and justly by the IRS, the U.S. Atty, and the Fed. Dist. Court during the Judicial Proceeding - in accordance with any litigants right to "Self Representation" and Due Process.

41 - Of the many issues which Petitioners could still put forth to this Court - under the question presented, there is one that can not be left out. That issue is the one of criminal act(s) committed by the government against a party in a civil case. When the Petitioners case moved into the Federal Appeal Court arena the Petitioners made the decision not to address any issue which was related to a criminal issue and/or act. But that changed when the Defendants filed their "BRIEF FOR THE APPELLEES". For some of the issue they addressed brought forth one or more criminal issue with it. Petitioners then had to make a choice on

how best to address the criminal issues before the Appeal Court, without causing any additional problems for themselves, the court, or for that matter those who might not be guilty of a true crime. It turned out to be a very difficult thing to do, but a method was developed by Petitioners. The first step was taken, but the second step was stopped by the Appeal Court. The first see Appendix - K: "REPLY BRIEF OF APPELLANTS - CIVIL ACTION.

SPECIAL NOTE:

Just three (3) days before Petitioner Mr. Johnson mailed (June 1, 1998) the special "APPELLANT/PLAINTIFF MOTION FOR EX PARTE WRIT OF EXTRAORDINARY PROCESS" the Appeal Court ruled on Petitioners' Appeal - thus baring the Petitioner's motion. Next, Petitioner Mr. Johnson filed a Petition for rehearing for the sole purpose of getting the Appeal Panel to consider the motion. But the result was that the Appeal Panel denied Petitioners' request, thus causing this case to come to this Court on a writ of certiorari.

REASONS FOR GRANTING THE PETITION

Vested Right Of Action Is Property Statement

Judicial process as a Due Process Right. Mr. Justice Louis Brandeis put it this way in *Crowell v. Benson (285 U.S. 22, 87)*:

> *"Under certain circumstances, the constitutional requirement of due process is a requirement of judicial process."*

The question: do all civil claims (not actions) warrant such a judicial process right guaranty? The answer: NO - not in general.

The public and the judiciary have long held that one's right to a FAIR Judicial Process is guaranteed by the Constitution - specifically by the judiciary under both the Fifth (for federal) and the Fourteenth (for state) Amendments. It is further established that all criminal cases (not criminal allegations) warrant a judicial process as a right of due process. This judicial process right does not extend to protect a civil claim prior to its commencement, but does extend to a civil action once commenced in accordance with the FRCP: Rule 3 - which turns a civil claim into a civil action. At this point the civil action becomes a Constitutional Due Process Property Right with all its protections. Petitioners found support for this ideology in the 1882 case *Pritchard v. Norton (106 U.S. 124, 132)* where Mr. Justice Stanley Matthews said:

> *"A vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference."*

There can be no argument that a criminal act in a civil case is a SUPERIOR arbitrary interference to a litigant's "Judicial Fairness Rights". If not addressed, the litigant will surely suffer a "Deprivation Of Procedural Due Process", and a "Miscarriage Of Justice" if the criminal act causes the litigant to ....

Judicial Fairness Right Statement

The claimed right of Petitioners' issue here is found in the Fifth Amendment Due Process Clause where it states ". . . nor [shall any person] be deprived of life, liberty, or property, without due process of law," - the guarantied right of fairness in our judicial system. This is one of the fundamental rights which all Americans believe is not an insignificant nor minor one, and is their guaranty against such a government that would use and/or allow tyrannical tactics to occur. Additionally, this Supreme Court has felt the guarantied right of fairness, in our judicial system, is more than just a casual one. Mr. Justice Hughes put it this way in 1938 when he said in *Railroad Comm. v. Pacific Gas Co. (302 U.S. 388, 393)*:

> *"The right to a fair and open hearing is one of the rudiments of fair play assured to every litigant by the Federal Constitution as a minimal requirement."*

The question: what type of action (or actions combined) could cause such a deprivation of a litigant's right to judicial fairness thus requiring a court to consider taking action for the purpose of correcting and/or preventing a miscarriage of justice? Petitioners feel that an act justifiably perceived as a crime in a civil matter/case will suffice for the issue of a Deprivation Of Procedural Due Process, therefore mandating review of the criminal matter prior to the civil. This assumption is based on two axioms. The first one is that fairness is a primary factor of our justice system - already addressed, and the second is that all civil matters are subordinate to all criminal matter when they are interwoven.

Deprivation Of Procedural Due Process

Webster defines "Deprivation" as; a depriving or being deprived of some thing. What type of intentional or arbitrary interference act would be cause for a deprivation of a claimant's rights, thus demanding the authority with current jurisdiction, at the time, to consider and possibly take an action for a remedy in addressing the matter? A few acts which could cause a deprivation of a judicial procedure are: a misrepresentation of facts (intentional - might be found to be perjury), a non-consideration or total disregard of facts, an outright disregard of judicial procedure, or at the extreme a criminal act of any type. Obviously any one of these acts in a civil litigation - especially criminal - could require an extraordinary remedy to be taken for the purpose of better serving justice - thereby protecting our liberty which is no small matter. Mr. Justice Black said in *Rosenberg v. U.S. (346 U.S. 273, 296)*:

> *"Our liberty is maintained only so long as justice is secure. To permit our judicial processes to be used to obstruct the course of justice destroys our freedom."*

When a government authority (be it the IRS, U.S. Attorney, or a Federal Court) purposely chooses to either commit and/or not to correct an inappropriate act - such as stated above - then an injustice will occur. When this happens we all suffer. Rev. Martin Luther King, Jr. put it quite well in 1963 when he said:[1]

> *"Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly."*

Miscarriage Of Justice

An appropriate good definition of the phase "Miscarriage of Justice" is found in Gilbert Law Summaries - Law Dictionary (1994© by Harcourt Brace Legal & Professional Pub., Inc.) where it states;

> Miscarriage of Justice: Prejudice to the rights of a party at a legal proceeding, contrary to the ends of justice, which requires reversal of the outcome or another trial.

Based on this definition either a prejudice, and Petitioners contend as well, a bias to the rights of a party and/or an act contrary to the ends of justice would suffice to cause a miscarriage of justice. Petitioners contend: it would make no difference if the act is perceived initially as being lawful when the intended end result is unlawful - possibly even criminal. This point is not just a non-lawyer Pro Se litigant legal assertion, it is a well established legal point supported by Justice Oliver Wendell Holmes in *Frost v. Railroad Comm. (271 U.S. 583, 601)* where he said:

> *"Even general lawful acts or conditions may become unlawful when done or imposed to accomplish an unlawful end."*

Petitioners feel an injustice may occur when a court fails to provide the required proper administration to a case - as has been shown in this case. If that injustice causes the said case to be wrongfully dismissed then there may have been a deprivation of a right to procedural due process for that case - as previously addressed. But, if that injustice was caused by an intentional failure (such as a prejudice/bias) of a court to provide the required proper administration of that case then a miscarriage of justice will have occurred - a far more serious issue than just an injustice issue. Thus, the need to consider the circumstances for granting this petition for certiorari, and in doing so helping to insure justice be better served for all litigants who choose to represent themselves.

---

[1] - "Letter from Birmingham Jail" 04/16/1963, in Why We Can't Wait 77, 79 (1964)

Petitioners want to insure that this Court understand that at all times in this proceeding they have been proceeding *pro se*, as they have a right to do under statute 28 U.S.C. §1654.

Petitioners are aware that their *pro se* status will not exempt them from the Federal Rules of Civil Procedure (FRCP), but the Court should be particularly understanding, and some times possibly lenient, with *pro se* petitioners for whom legal procedures often present insurmountable obstacles. *Neizke v. Williams*, 490 U.S. 319, 325; *Polk v. Dodson* 454 U.S. 312, 326; *Haines v. Kerner*, 404 U.S. 519, 520

CONCLUSION

Petitioners, proceeding *pro se* alleged a deprivation of their constitutional rights at the hands of first the IRS, then the U.S. Attorney and the Lower Court. Further, Petitioners argue they had a vested right of action which was dismissed without sufficient due process.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

William N Johnson II   Emma G Johnson

DATE: November 2, 1998

APPENDIX

APPENDIX - A:

DECISION OF FEDERAL APPEAL COURT

FILED STAMP: U.S. COURT OF APPEALS
FILED
May 28, 1998

CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE 5TH CIRCUIT

No. 97-50535
Summary Calendar

WILLIAM N. JOHNSON, III;
EMMA G. JOHNSON, Plaintiffs-Appellants,

versus

INTERNAL REVENUE SERVICE, ET AL.,
Defendants-Appellees.

- - - - - - - - - - -

Appeal from the United States District
Court for the Western District of Texas
USDC No. A-95-CV-850

- - - - - - - - - - -

Before REAVLEY, HIGGINBOTHAM and JONES, Circuit Judges.
PER CURIAM:*

William N. Johnson, III, and Emma G. Johnson appeal the district court's dismissal of their claims against the Internal Revenue Service and its employees arising out of a tax dispute for lack of subject matter jurisdiction. We have reviewed the record and the district court's opinion and find no reversible error. Accordingly, we affirm for essentially the reasons given by the magistrate judge and approved by the district court. Johnson v. Internal Revenue Service, et al., No. A-95-CA-850 JN (W.D. Tex. Feb. 25, 1997).

AFFIRMED.

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* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4."

"s/TMR" "s/PS_?" "s/E_?"

APPENDIX - B:

FINAL JUDGMENT
DECISION FEDERAL DISTRICT COURT

FILED STAMP: FILED
APR 14 1:26 PM '97

BY "s/__ DEPUTY

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WILLIAM JOHNSON, ET AL. §
§ CIVIL NO.
VS. § A-95-CA-850 JN
§
INTERNAL REVENUE SERVICE, ET AL.,

FINAL JUDGMENT

Before the Court is the above-entitled cause of action. In light of the Order accepting the Magistrate Judge's Report and Recommendation, the Court enters the following Final Judgment pursuant to Federal Rule of Civil Procedure 58.

IT IS ORDERED, ADJUDGED AND DECREED that all Plaintiffs' claims against all Defendants are hereby DISMISSED WITHOUT PREJUDICE."

SIGNED AND ENTERED this 14th day of April, 1997.

"s/James R. Nowlin"
JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE
"55"
(this number hand written bottom of page)
- Clerk's Docket Number -

APPENDIX - C:

RELEVANT ORDER - FEDERAL DISTRICT COURT
Magistrate Judge's
"Report and Recommendation"

ORDER: The "REPORT" Approved and Accepted

FILED STAMP: FILED
APR 14 1:26 PM '97

BY "s/__ DEPUTY

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WILLIAM JOHNSON, ET AL. §
§ CIVIL NO.
VS. § A-95-CA-850 JN
§
INTERNAL REVENUE SERVICE, ET AL.,

ORDER

Before the Court is the above-entitled cause of action. This cause was referred to the United State Magistrate Judge for findings and recommendations pursuant to 28 U.S.C §636(b) and Rule 1 of Appendix C of the Local Rules of the United States District Court for the Western District of Texas. The Magistrate Judge filed his Report and Recommendation on February 25, 1997 (Clerk's Doc. No. 51). Plaintiffs filed their Objections to the Report and Recommendation on March 12th (Clerk's Doc. No. 52).

The Court notes that Plaintiffs' Objections fail to address the vast majority of the conclusions of law made by the Magistrate Court. However, because the Plaintiffs are proceeding *pro se* and in light of the Objections, the Court has undertaken a *de novo* review of the entire case file in this cause. Upon such review, the Court finds that the Recommendation filed by the Magistrate Judge is correct and should be accepted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the United States Magistrate Judge's Report and Recommendation filed in this cause is APPROVED and ACCEPTED by this Court.

ACCORDINGLY, IT IS ORDERED, ADJUDGE AND DECREED that Defendants' Motion to Dismiss and Alternative Motion for Summary Judgment is hereby GRANTED and that any claims Plaintiffs may have brought against the United States under the Federal Tort Claims Act, 28 U.S.C. § 1346(a)(1), 26 U.S.C. § 7433, 42 U.S.C. § 1983 and *Bivens* are DISMISSED WITHOUT PREJUDICE.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all Plaintiff's claims against the individual Defendants named in their individual and official capacities are DISMISSED WITHOUT PREJUDICE.

FINALLY, IT IS ORDERED that this cause is CLOSED and that any pending motions are hereby DENIED AS MOOT.

SIGNED AND ENTERED this 14th day of April, 1997.

"s/James R. Nowlin"
JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

"54"
(this number hand written bottom page 1)
- Clerk's Docket Number -

APPENDIX - D:

Opinions and Conclusions of Law "REPORT AND RECOMMENDATION"

FILED STAMP: FILED
Feb 25 11:23 AM '97
U.S. CLERK'S OFFICE
BY "s/__ DEPUTY

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WILLIAM JOHNSON, ET AL., §
§ CIVIL NO.
V. § A-95-CA-850 JN
§
INTERNAL REVENUE SERVICE[1], ET AL.

REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

TO: THE HONORABLE JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

The Magistrate Court submits this Report and Recommendation to the United States District Court pursuant to 28 U.S.C. §636(b) and Rule 1(e) of Appendix C of the Local Court Rules of the United States District Court for the Western District of Texas, Local Rules for the Assignment of Duties to United States Magistrates, as amended, effective January 1, 1994.

---

[1] - The Court leaves the Internal Revenue Service as a named party in this case. However, as noted, the United States is the proper-party defendant. Plaintiffs could be allowed to amend their complaint to name the United States as defendant; but in this case, such amendment would be futile. *Forman v. Davis*, 83 S.Ct. 227, 230 (1962).

Before the Court is Defendants' Motion to Dismiss and Alternative Motion for Summary Judgment filed on September 26, 1996 (Clerk's Doc. No. 21) and Plaintiffs' Response to Defendants' Motion to Dismiss and Alternative Motion for Summary Judgment filed October 9, 1996 (Clerk's Doc. No. 26).

Plaintiffs' Complaint

In their original complaint, Plaintiffs William and Emma Johnson claim that the I.R.S. "double taxed" them for the tax years 1988, 1989, and 1990. The parties agree that the double taxation issue has been resolved; however, the Plaintiffs still seek damages in addition to any tax refund or credit afforded them by the Internal Revenue Service. Originally, Plaintiffs also sought a Temporary Restraining Order from the District Court to compel the I.R.S. to stop levying the salary of Emma Johnson and to have the funds withheld from her December 1995 and January 1996 wages returned to her. The District Court denied this request.

Plaintiffs assert that IRS employees informed them that they did not need to file an Income Tax Return for 1988 if they owed no taxes for that year. Plaintiffs also assert that they informed I.R.S. employees that they would be filing their 1988 return after April 15, 1992, because they were in the process of being audited for their 1986 return.

Plaintiffs maintain that the first notice they received from the I.R.S. was a form letter dated 9/10/90 requesting Emma Johnson to file her 1988 income tax return under her social security number. Plaintiffs claim that Emma Johnson was then informed by letter dated 5/10/91 that she owed $1,783.64 in taxes for the year of 1988. Plaintiffs state that they did not file a 1988 tax return until February 16, 1994. Plaintiffs state that their joint return, showing William Johnson as the primary taxpayer and Emma Johnson as spouse, showed that they owed no taxes. Plaintiffs also claim that they enclosed a seven page statement along with that return to explain to the I.R.S. why the return was filed late. Plaintiffs maintain that they also mailed a copy of that statement to the I.R.S. District Director, named as a defendant in this case. Plaintiffs claim that on March 7, 1994, they received a letter from Sandra L. Wise, Problems Resolution Specialist stating that District Director Michael Killfoil asked her to research Plaintiffs' problem. Plaintiffs state that the I.R.S. and Killfoil informed them that they would not be refunded the 1988 tax withholding amount of $1,771.96 because Plaintiffs did not file a joint return prior to April 15, 1992.

Plaintiffs allege that Killfoil and Wise were aware that "we had already filed our joint personal 1988 Income Tax Return under my [William Johnson's] SSN and we owed no taxes for that tax year" but that the I.R.S. continued to pursue a tax collection case against Emma Johnson under her social security number. Plaintiffs further claim that on August 13, 1994 Plaintiffs filed a joint personal 1993 income tax return showing a refund due of $1,332.93 which Plaintiffs requested be carried forward to the 1994 tax year. Plaintiffs claim that they received a letter dated September 26, 1994 claiming that Emma Johnson owed the I.R.S. $1,096.58 for tax year 1988 after the I.R.S. credited the Johnson's joint refund of $1,332.93 to Emma Johnson's case. Plaintiff William Johnson allegedly called the I.R.S. on October 5, 1994, and spoke to a "Ms. Hill" who informed Plaintiff that the I.R.S. had made a mistake and that Plaintiffs' case had been referred to the I.R.S. Problem Resolution the day before and that someone from Problem Resolution should be contacting them soon. Plaintiffs assert that they were never contacted by the I.R.S. Plaintiffs maintain that they filed their joint personal 1994 and 1991 income tax returns on April 14 and 15, 1995, and that these returns showed Plaintiffs were due a total of $3,338.96 plus interest. Plaintiffs assert that Plaintiff William Johnson became seriously ill with blood clots in May of 1995. Plaintiffs contend that his condition was aggravated by "having to prepare this law suit complaint on a computer."

Plaintiffs contend that on October 23, 1995, Emma Johnson was notified by the personnel department of her employer that they had received an I.R.S. Notice of Levy on Wages, Salary, or Other Income which stated she owed unpaid taxes of $1,701.30 for the 1990 tax year. Plaintiffs assert that the I.R.S. erred in charging Emma Johnson with tax liability under her own social security number and erred because the Johnson's did not owe any personal income tax for any past tax year. The Johnsons allege that in fact the I.R.S. owed them a refund for the 1991 and 1994 tax returns they filed in April 1995. Plaintiff William Johnson claims he again called Sandra Wise to inform her of the problem, but that she stated she was unable to help him any further. However, Ms. Wise did inform Plaintiffs that she would send them transcripts informing them of how their joint 1991, 1993, and 1994 income tax refunds had been applied to pay the alleged unpaid taxes for the years 1988, 1989, and 1990. Plaintiffs claim that those transcripts "confirmed" that Plaintiffs had been "double taxed" for 1988. Plaintiffs seemingly base their misguided contention of "double taxation" on the fact that they filed an extremely late *Joint* Income Tax Return while the tax assessed was assessed only against Emma Johnson. Plaintiffs assert that on November 1, 1995 William Johnson received a telephone call from Sandra Wise informing him that because they had filed a joint return for 1988, the I.R.S. should not have levied Emma Johnson's wages, that Wise was going to correct this mistake, and that the Johnson's should be in receipt of a refund. Plaintiffs assert that Ms. Wise did not correct the problem.

Plaintiffs assert on December 6, 1995, Emma Johnson was again notified by the personnel department of her employer that Mary Blum of the I.R.S. had notified them by phone. Ms. Blum faxed them documents for the purpose of garnishing Emma Johnson's December and January wages for the 1990 tax year.

Plaintiffs assert that they are suing Margaret Richardson, Commissioner, "due to the fact that she has made so many public statements about what she has done and will do in the future so to improve the operation of the I.R.S." Complaint at fact 26. Although Plaintiffs list Ms.

Richardson in the heading of their Complaint, they state only that they intend to subpoena her to testify in court about her statements and purpose for making them.

Plaintiffs assert that they name Michael Killfoil in their complaint "due to the fact that he failed to perform his job and did not attempt to correct improper actions taken by the I.R.S. against us for the double taxation of my wife's (EGJ) wages for the 1988 tax year." Plaintiffs seemingly further claim that in Killfoil's March 28, 1994 letter he misled them as to the reduction of the Plaintiff's tax liability. Plaintiffs claim that Killfoil "knew that he and his wife had filed a joint personal income tax return for the 1988 tax year" and yet still pursued a tax action against Emma Johnson. Furthermore, Plaintiffs claim that in regard to a "February 15, 1994 statement" Plaintiffs sent Killfoil, he failed to "check and see if the facts stated in the statement were true or false." This "statement" was Plaintiffs' attempt to explain why they were unable to timely file their 1988 income tax return. Plaintiffs also claim that Killfoil "did not dictate, read, or write, his letter dated March 28, 1994," but "merely signed it." Plaintiffs assert that Killfoil either recklessly or knowingly "double taxed" them.

Plaintiffs also name Sandra Wise, Problem Resolution Specialist in their Complaint. They contend that Wise failed to perform her duties and failed to correct the illegal double taxation of the Plaintiffs for the 1988 tax year. They also claim that Wise lied to them during a

November 1, 1995, telephone conversation when she stated that she would "correct the double taxation problem." Plaintiffs also claim that Wise lied to them and "covered up her knowledge of the double taxation" on several occasions and refused to write Plaintiffs a letter stating that the I.R.S. had improperly levied Emma Johnson's wages and failed to properly address the 1988 tax problem. Plaintiffs also seem to want to sue Wise in her individual capacity. They state: "[B]ecause the evidence we have in this case will show that Ms. Wise tried to cover up her knowledge of the double taxation by saying she misunderstood the facts of our I.R.S. case, and because of her incompetent actions in properly addressing our problem -- in performing her job -- we will ask the court to hold Ms. Sandra L. Wise directly and personally responsible for her part of the damages and harm caused us in having to pursue this lawsuit."

Plaintiffs request the following relief: (1) a Court Order directing the I.R.S. to immediately address and correct the double taxation problem; (2) a court order directing the I.R.S. to extend the filing deadlines for the tax years 1989, 1990, and 1992 for three years from the date of resolution of Plaintiffs' cause of action; (3) tax free compensation for actual and consequential damages in the amount of $193,194.99 plus additional damages accruing after the date of filing of the complaint; (4) tax free punitive damages for the sum of ten times the total of the actual and consequential damages; and, (5) a court order directing the I.R.S. to pay for twelve televised sixty-second national service apology spots on four major television networks at times and dates chosen by Plaintiffs.

Defendants' Answer

In their Answer Defendants assert several defenses. Defendant Internal Revenue Service first asserts that it is not a suable entity. *Blackmar v. Guerre*, 72 S.Ct. 410, 411 (1952). Second, the Internal Revenue Service officials plead that the court lacks personal jurisdiction over them because of improperly effectuated service of process under the Federal Rules of Civil Procedure. Third, the named Internal Revenue Service officials plead that the Court lacks subject matter jurisdiction over the claims raised in Plaintiffs' Complaint. Fourth, Defendants plead that they are entitled to sovereign immunity from the claims against them in their official capacities. Fifth, Defendants plead that Plaintiffs have failed to pursue and exhaust their administrative remedies. Sixth, Defendants plead that Plaintiffs have both failed to exhaust their procedural remedies and failed to state a claim under the Federal Torts Claims Act. Seventh, Defendants assert that no claim in Bivens lies in tax cases, because the Plaintiffs have other statutorily granted remedies. Eighth, Defendants plead that Plaintiffs have failed to state a claim for any violation of a constitutional or statutory right. Ninth, the named officials assert that they are entitled to qualified immunity in their individual capacities. Defendants also assert several other affirmative defenses regarding applicable statutes of limitations and other statutes barring relief.

Defendants' Motion to Dismiss and Alternative Motion for Summary Judgment

The Internal Revenue Service and its named officials, Margaret Richardson, Commissioner, Michael L. Killfoil, District Director, and Sandra L. Wise, Problems Resolution Specialist, move this Court for an Order dismissing the Plaintiffs' case against them, and in the alternative granting the Defendants summary judgment. Their bases for dismissal and/or summary judgment are 1) improper service of process and lack of personal jurisdiction; 2) that IRS officials are entitled to sovereign immunity for suits against them in their official capacities; and 3) that the IRS is not a suable entity and the suit must be brought against the United States.

The Court's Construction of Plaintiffs' Claims

Plaintiffs insist upon bringing bring their claims pursuant to 28 U.S.C. § 1346(a)(1) and in their Response, they make a vague reference to 42 U.S.C. § 1983. Although Plaintiffs have been given opportunities to amend their pleadings, and have been ordered by this Court to plead with more specificity, they have declined to do so for their own cryptic reasons. Since they are proceeding *pro se* Plaintiffs' pleadings are to be held to less stringent standards than formal pleadings drafted by lawyers. *Haines v. Kerner*, 92 S.Ct. 594, 595-96 (1972); *Moore v. McDonald*, 30 F.3d 616, 620 (5th Cir, 1994). Thus the Magistrate Court, construing Plaintiffs' complaint as liberally as possible, concludes that Plaintiffs' Complaint could be construed as pleading under the Federal Tort Claims Act, *Bivens*, and/or 26 U.S.C. § 7433 in addition to the two statutes mentioned above. The Court will address each possible claim in turn with regard to whether or not this court has subject matter jurisdiction over Plaintiffs' claims.

Improper Service of Process and Lack of Personal Jurisdiction

The Court finds Plaintiffs have not properly effectuated service of process pursuant to Federal Rules of Civil Procedure 4(i) and 4(e), and thus the claims against the individual defendants are properly dismissed for lack of personal jurisdiction pursuant to Rule 12(b)(2) and for improper service of process pursuant to Rule 12(b)(5). Plaintiffs agree that service of process was not properly effectuated, but blame the Internal Revenue Service for not properly explaining to Plaintiffs how to effectuate proper service. The Magistrate Court finds that Plaintiffs' contentions are without merit and dismisses Plaintiffs' claims pursuant to the Federal Rules of Civil Procedure. However, the foregoing notwithstanding, in order to effectuate the ends of justice this court proceeds to the merits of Plaintiffs' claims agsinst the Internal Revenue Service and the United States.

The Internal Revenue Service as a Suable Entity

Defendants properly assert that the Internal Revenue Service is immune from suit. In the instant lawsuit, Plaintiffs have named the IRS as a defendant. Because

Plaintiffs are proceeding *pro se*, and because the United States has responded to the Complaint, the Court will consider this suit as though the proper party, the United States, was named by Plaintiffs.

The United States is immune from suit except as it waives its sovereign immunity. *Wilkerson v. United States*, 67 F.3d 112, 118 (5th Cir. 1995). Waivers of sovereign immunity must be strictly construed in favor of the United States. *United States Dep't of Energy v. Ohio*, 503 U.S. 607 (1992). *Smith v. Booth*, 823 F.2d 94, 96 (5th Cir. 1987). Plaintiffs bear the burden of establishing federal subject matter jurisdiction. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936). The Magistrate Court finds that Plaintiffs have failed to establish subject matter jurisdiction with regard to their claims against the United States and that the United States has not waived sovereign immunity as to Plaintiffs' claims.

Furthermore, an action for damages against a federal official in his or her official capacity is viewed as a suit against the federal government itself, and is thus barred by the doctrine of sovereign immunity. *Garcia v. United States*, 538 F.Supp. 814, 816 (S.D.Tex. 1982). The Magistrate Court finds that the claims against the named individual I.R.S. employees and against Margaret Richardson, are claims against them in the official capacities and are thus barred. The only exception is the claims against Sandra L. Wise in her individual capacity, which are not cognizable due to Plaintiffs' failure to properly effectuate service.

Lack of Subject Matter Jurisdiction -- Standard

Sua sponte dismissal for lack of subject matter jurisdiction is proper at any stage of the proceedings. Fed. R.Civ.P. 12(h)(3). In ruling on a motion to dismiss for lack of subject matter jurisdiction, the court must take as true all allegations in the complaint. F.R.C.P. 12(b)(1); *Saraw Partnership v. United State*, 67 F.3d 567, 569 (5th Cir. 1995). A motion to dismiss under 12(b)(1) should not be granted "unless it appears certain that the plaintiff cannot prove any set of facts in support of {his} claim which would entitle {him} to relief." *Id.; Hobbs v. Hawkins*, 968 F.2d 471, 475 (5th Cir. 1992).

Jurisdiction is essentially the authority conferred by Congress to decide a given type of case. *Hagans v. Levine*, 415 U.S. 528, 94 S.Ct. 1372 (1974). Federal courts are without power to entertain claims otherwise within their jurisdiction, if they are "so attenuated and unsubstantial as to be absolutely devoid of merit," "wholly insubstantial," "obviously frivolous," "plainly insubstantial," or "no longer open to discussion." *Id., citing Ex parte Poresky*, 290 U.S. 30 (1933). A question may be "plainly insubstantial" because it is "obviously without merit." *Id.* at 537.

Subject Matter Jurisdiction Under 28 U.S.C. § 1346(a)(1)

First, the Court addresses Plaintiffs' attempt to establish this court's jurisdiction over this action by reason of 28 U.S.C. § 1346(a)(1).

28 U.S.C. § 1346(a)(1) provides as follows:

> (a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:
> (1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws....

28 U.S.C. § 1346 (1993). In order to challenge the government's tax assessment or collection actions by means of § 1346(a)(1), a taxpayer must first pay the total amount of tax, interest, and penalty assessed. *Flora v. United States*, 362 U.S. 145 (1960). With respect to income taxes, Plaintiffs would be required to pay all the tax, interest, and penalty.

Furthermore, 26 U.S.C.A. § 7422 provides the administrative requirement of filing a claim for a refund prior to filing suit. It provides in pertinent part:

> No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner

> wrongfully, collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

26 U.S.C.A. § 7422 (1989).

Plaintiffs have failed to comply with the administrative prerequisites as set forth in § 7422(a) for a refund suit. Furthermore, Plaintiffs state in their Response that the "wrongful double taxation issue has been addressed and corrected" and now only seek "damages." Jurisdiction for such a suit does not lie under this statute. Accordingly, the Magistrate Court finds that the court lacks subject matter jurisdiction with regard to Plaintiffs' claims brought pursuant to 28 U.S.C. § 1346(a)(1).

Jurisdiction Under the Federal Tort Claims Act (FTCA)

The Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b), exempts any claim arising in respect to the assessment or collection of any tax. 28 U.S.C. § 2680(c). The Fifth Circuit has held that the exemption to the FTCA applies to all tax-related claims. *Interfirst Bank Dallas, N.A. v. United States*, 769 F.2d 299, 307 (5th Cir. 1985). Accordingly, the Plaintiffs' tax-related claims are barred under the FTCA. Therefore, the Magistrate Court also finds that the District Court also lacks subject matter jurisdiction over Plaintiffs claims under the FTCA.

Jurisdiction Under 26 U.S.C. § 7433

Although Plaintiffs' Complaint does not specifically allege that they are bringing a claim against the United States under 26 U.S.C. § 7433, this appears to be the only statutory waiver of sovereign immunity by the United States which might be applicable to these circumstances. However, treating the Plaintiffs' Complaint as an action against the United States pursuant to 26 U.S.C. § 7433, the Court lacks subject matter jurisdiction to hear such a claim because the Plaintiff has not filed the prerequisite administrative claim for relief as is required by 26 U.S.C. § 7433(d). The Plaintiffs do not assert that they have properly pursued their administrative remedies. In fact, Plaintiffs insist that they have informed various individuals of their plight by sending letters and through telephone calls. None of Plaintiffs' actions are in accordance with the administrative procedures set forth in Section 7433 and Treasury Regulation § 301.7433-1. The Magistrate Court finds that Plaintiffs have failed to exhaust their administrative remedies. Accordingly, the District Court does not have subject matter jurisdiction over these claims.

Claims Under § 1983 and *Bivens*

The Magistrate Court finds that Plaintiffs have failed to state a claim under *Bivens* and Section 1983. A District Court does have subject matter jurisdiction over claims under *Bivens* and Section 1983. 28 U.S.C. § 1331. To state a claim under 42 U.S.C. § 1983, Plaintiffs must show that they have been deprived of a Constitutional or other federal right, privilege or immunity by a person acting under color of state law. Section 1983 only provides for redress for actions taken under color of state law, while the actions complained of here were taken pursuant to federal law by federal agents and private parties. *See Broadway v. Block*, 694 F.2d 979, 981 (5th Cir. 1982) (actions of federal officials taken under color of federal law cannot form basis of suit under section 1983); *Zernial v. United States*, 714 F.2d 431, 435 (5th Cir. 1983). Accordingly, Plaintiffs have failed to state a cause of action under Section 1983. Furthermore, the Plaintiffs' claims are wholly insubstantial and patently frivolous and thus the Court lacks subject matter jurisdiction over these claims. *See Zernial*, 714 F.2d at 436.

The only other basis for the Plaintiffs' damages claims lies pursuant to *Bivens v. Six Unknown Agents*, 403 U.S. 388, 91 S.Ct. 1999 (1971). For *Bivens* to be an available remedy for tax collection abuses, Plaintiffs must assert a deprivation of a constitutional right. *Bivens, supra*, 403 U.S. at 397; *Rutherford v. United States*, 702 F.2d 580, 585 (5th Cir. 1983). Plaintiffs have not stated an abuse of a constitutional right. Their only claim is that their constitutional right not to be "double-taxed" has been violated. After careful scrutiny of the Constitution, the Magistrate Court finds that there is no "constitutional right not to be 'double taxed'" extant in the Constitution of the United States of America. The Magistrate Court finds that Plaintiffs have failed to state a cause of action under *Bivens*. Furthermore, the

Magistrate Court finds that Plaintiffs' claims are frivolous and are properly dismissed as such for lack of subject matter jurisdiction.

Claims Against Wise

Moreover, as to the possible claims against Wise in her individual capacity, the Magistrate Court advises Plaintiffs that, taking all of Plaintiffs' allegations as true. Wise is most probably entitled to qualified immunity. Plaintiffs assert that Wise should be held responsible for not performing her job correctly. A federal official is immune from suit in federal district court for state law torts if he acted within the scope of his legally authorized discretionary duties. *Barr v. Mateo*, 360 U.S. 564 (1959). However, a federal official has only good faith or qualified immunity to *Bivens* actions. *Butz v. Economou*, 438 U.S. 478 (1978). Under *Butz* and its progeny, officials "performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known," regardless of "bare allegations of malice." *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

The Magistrate Court notes that Plaintiffs allegations that Ms. Wise did not perform her job in accordance with their wishes is not a violation of a clearly established constitutional rights and thus Wise is most probably entitled to qualified immunity. *Keese v. United States*, 632 F.Supp 85, (S.D. Tex.1985).

Plaintiffs' claims against Wise are tautological under the qualified immunity standard because Plaintiffs are accusing Wise of performing her discretionary functions incorrectly. They do not claim harassment, only lack of their desired response to their tax problems. Plaintiffs' claims against Wise are clearly frivolous and harassing; especially in light of Plaintiffs' consistent failure to file their income tax returns. The Magistrate Court does not rule on these claims because of its prior finding that service was not properly effectuated and that it does not have personal jurisdiction over Ms. Wise. The Magistrate Court merely notes the issue of qualified immunity as an advisory to Plaintiffs.

RECOMMENDATION

In light of the foregoing, the Magistrate Court RECOMMENDS that the District Court GRANT Defendant's Motion to Dismiss and Alternative Motion for Summary Judgment and DISMISS WITHOUT PREJUDICE Plaintiffs' claims against the United States under the FTCA, 28 U.S.C. § 1346(a)(1), 26 U.S.C. § 7433, 42 U.S.C. § 1983 and *Bivens*, for lack of subject matter jurisdiction. The Magistrate Court RECOMMENDS that the District Court GRANT Defendant's Motion to Dismiss and Alternative Motion for Summary Judgment and DISMISS WITHOUT PREJUDICE Plaintiffs' claims against all individually named Defendants in both their official and individual capacities. Lastly, the Magistrate Court ORDERS the Clerk's Office to TERMINATE all pending motions filed pursuant to the above cause number.

WARNINGS

The parties may file written objections to the recommendations made in this report, and said objections must be made within ten (10) days from the date of receipt of this recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The district court need not consider frivolous, conclusive, or general objections. *See Battle v. U.S. Parole Commission*, 834 F.2d 419, 421 (5th Cir. 1987); *Nettles v. Wainwright*; 677 F.2d 404, 410 & n.8 (5th Cir. 1982) (Unit B *en banc*).

Failure to file written objections to the findings and recommendations contained in this report within the ten day period shall bar an aggrieved party from receiving a *de novo* review by the district court of the findings and recommendations in this report, *see* 28 U.S.C. §636(b)(1)(C), *Thomas v. Arn*, 474 U.S. 140, 150-53, 106 S.Ct. 466, 472-74 (1985), *Nettles v. Wainwright*, 677 F.2d at 410; and shall bar an aggrieved party from attacking on appeal the factual findings accepted or adopted by the district court contained in this report, except upon grounds of clear error or manifest justice, *see Douglass v. United Services Auto. Ass'n*, 65 F.3d 452, 457 (5th Cir. 1995); *Carter v. Collins*, 918 F.2d 1198, 1203 (5th Cir. 1990); *Nettles*, 677 F.2d at 410. However, a failure to object does not limit the appellate court's review of legal conclusions made in this report. *Douglass*, 65 F.3d at 457; *Hardin v. Wainwright*, 678 F.2d 589, 591 (5th Cir. 1982); *cf. Thomas v. Arn*, 474 U.S. at 150-

55; 106 S.Ct. at 472-75 (1985).

The Clerk is directed to mail a copy of the instant recommendation to all parties by certified mail, return receipt requested.

SIGNED and Entered this the "s/ 25th day of February, 1997 at Austin, Texas.

"s/ A D A
ALAN D ALBRIGHT
UNITED STATES MAGISTRATE JUDGE

"51"
(this number hand written bottom page 1)
- Clerk's Docket Number -

APPENDIX - E:

PETITION FOR REHEARING
DECISION OF FEDERAL APPEAL COURT

FILED STAMP: U.S. COURT OF APPEALS
FILED
AUG 3, 1998
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE 5TH CIRCUIT

No. 97-50535

WILLIAM N JOHNSON, III; EMMA G JOHNSON
Plaintiffs-Appellants,
v.

INTERNAL REVENUE SERVICE, Department of the Treasury, Washington DC; and MARGARET M. RICHARDSON, Commissioner of the Department of the Treasury; and MICHAEL L. KILLFOIL, District Director, Internal Revenue Service; and SANDRA L. WISE, Problem Resolution Specialist, Internal Revenue Service
Appellees - Defendants

- - - - - - - - - - - - - - - - - -

Appeal from the United States District Court for the Western District of Texas

- - - - - - - - - - - - - - - - - -

ON PETITION FOR REHEARING

Before REAVLEY, HIGGINBOTHAM and JONES, Circuit Judges.
PER CURIAM:

Appendix - E: cont.

IT IS ORDERED that the petition for rehearing filed in the above case is "denied". ("-" hand written)

ENTERED FOR THE COURT:

"s/__T M Reavley______________"
United States Circuit Judge

REHG-2 **CLERK'S NOTE:**

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

APPENDIX - F:

RELEVANT ORDER - FEDERAL DISTRICT COURT

ORDER: "Hearing" - 1st and only one

FILED STAMP:

FILED
Dec 30 3:48 PM '96
U.S. CLERK'S OFFICE
BY "s/__ DEPUTY

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WILLIAM JOHNSON, ET AL., §
§ CIVIL NO.
V. § A-95-CA-850 JN
§
INTERNAL REVENUE SERVICE, ET AL.

ORDER

It is HEREBY ORDERED that the Parties appear for a hearing on all pending motions on January 21, 1997, at 2:00 P.M.

SIGNED this 30th day of December, 1996.

"s/ A D A "
ALAN D ALBRIGHT
UNITED STATES MAGISTRATE JUDGE

"37"
(this number hand written bottom of page)
- Clerk's Docket Number -

APPENDIX - G:

RELEVANT ORDER - FEDERAL DISTRICT COURT

ORDER: Plaintiffs - Replead "COMPLAINT"

FILED STAMP:
FILED
Jan 3 10:57 AM '97
U.S. CLERK'S OFFICE
BY "s/__ DEPUTY

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WILLIAM JOHNSON, ET AL., §
§ CIVIL NO.
V. § A-95-CA-850 JN
§
INTERNAL REVENUE SERVICE, ET AL.

ORDER

It is HEREBY ORDERED that the Plaintiffs replead their Complaint with specificity including the statute, portion of the United States Constitution, or portion of the Texas Constitution under which they are bringing this cause of action. Plaintiffs are ORDERED to do so before the hearing scheduled for January 21, 1997, at 2:00 P.M. or this cause number shall be DISMISSED WITHOUT PREJUDICE. Furthermore, the Court exhorts the Plaintiffs that the jurisdictional basis under which they based their claims in their Complaint is incorrect. 28 U.S.C. § 1345(a)(1) refers only to causes of action for the recovery of erroneously collected taxes and penalties and for the recovery of collected sums which are alleged to be excessive or wrongfully collected under the internal revenue laws. Based upon the facts as described by the

Plaintiffs, they are not attempting to recover money collected by the Internal Revenue Service, but are trying to collect tort damages for injuries caused by the allegedly improper collection of taxes. "Even though the wrongful Double Taxation issue has been addressed and corrected by the IRS, the damage still occurred." *See* Plaintiffs' Response to Defendants' Motion to Dismiss and Alternative Motion for Summary Judgment. Consequently, the Plaintiffs have failed to properly plead jurisdiction. Furthermore, in liberally construing Plaintiffs' pleadings, this Court finds that Plaintiffs are possibly attempting to state a claim under 42 U.S.C. § 1983.*Id.* To do so, Plaintiffs must state a violation or violations of a Constitutional right. Thus far, they have failed to clearly and specifically set forth a violation of the United States Constitution. They must do so before January 21, 1997 or the Court ORDERS their cause of action DISMISSED WITHOUT PREJUDICE.

SIGNED this 3rd day of January, 1997.

"s/ A D A "
ALAN D ALBRIGHT
UNITED STATES MAGISTRATE JUDGE

"38"
(this number hand written bottom page 1)
- Clerk's Docket Number -

APPENDIX - H:

RELEVANT ORDER - FEDERAL DISTRICT COURT

ORDER: Defendants' Motion for Protective Order Staying Discovery - GRANTED

FILED STAMP:
FILED
Jan 3 3:17 PM '97
U.S. CLERK'S OFFICE
BY "s/__ DEPUTY

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WILLIAM JOHNSON, ET AL., §
§ CIVIL NO.
V. § A-95-CA-850 JN
§
INTERNAL REVENUE SERVICE, ET AL.

ORDER

Before the Court is Defendants' Motion for Protective Order Staying Discovery (Clerk's Doc. No. 22) filed on September 26, 1996 and Plaintiffs' Response to that Motion filed October 7, 1996.

After carefully reviewing the Motion, Response, and the applicable case law, the Court is of the opinion that Defendants' Motion should be GRANTED. Defendants have asserted the defense of immunity and thus no discovery shall be permitted until this defense is resolved. *Harlow v. Fitzgerald,* 457 U.S. 800 (1985). Accordingly, it is HEREBY ORDERED that the Plaintiffs shall not be allowed to pursue discovery in this case until the court has ruled upon the defenses raised in the Defendants' Motion to Dismiss and

Alternative Motion for Summary Judgment. It is FURTHER ORDERED that Plaintiffs' Motions for Sanctions (Clerk's Doc. Nos. 23, 29, 31 & 34) and Plaintiffs' Motion for Contempt of Court (Clerk's Doc. No. 31) be HEREBY DISMISSED AS MOOT.

SIGNED this 3rd day of January, 1997.

"s/ A D A "
ALAN D ALBRIGHT
UNITED STATES MAGISTRATE JUDGE

"39"
(this number hand written bottom page 1)
- Clerk's Docket Number -

APPENDIX - I:

RELEVANT ORDER - FEDERAL DISTRICT COURT

ORDER: Plaintiffs' Non-Motion for More Definite Statement - DENIED

FILED STAMP:
FILED
Apr 17 8:23 AM '96
U.S. CLERK'S OFFICE
BY "s/__ DEPUTY

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WILLIAM N. JOHNSON, ET AL., §
EMMA G. JOHNSON § CIVIL NO.
VS. § A-95-CA-850
INTERNAL REVENUE SERVICE, § JN
ET AL.

ORDER

Before the Court is Plaintiffs' Motion for More Definite Statement filed on April 4, 1996. Plaintiffs - acting pro se in this matter - apparently intended this document to be a request directed at the Defendants and noted that a copy of the request was being provided to the Court as a courtesy. The document, however, was docketed as a motion for a more definite statement, and Defendants filed a response in opposition on April 15, 1996. Accordingly, due to Defendants opposition to the request, the Court shall treat the pleading as a motion.

Plaintiffs request that the Government provide detailed factual and legal statements supporting the affirmative defenses raised in the answer. Plaintiffs also request that Defendants supply copies of the cases cited in the answer.

Rule 12(e) states in relevant part that such a motion is proper only "[i]f a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading. . . ." Fed. R. Civ. P. 12(e). Such motions are generally disfavored.

In this situation, Defendants' answer is not a pleading to which a responsive pleading is required. Thus, Plaintiffs' motion is inappropriate and should be denied. It is similarly inappropriate for Plaintiffs to request that Defendant provide legal research and copying. Plaintiffs have filed this lawsuit and have chosen to represent themselves in this litigation. As such, it is Plaintiffs' responsibility to bear such burdens. Plaintiffs may learn additional details through customary pre-trial discovery, if the case goes any further.

The Court also takes the opportunity to advise Plaintiffs that they must be diligent in their prosecution of this matter during its pendency in this Court. Plaintiffs pro se status does not entitle them to more lenient scrutiny, and the Fifth Circuit has stated that "the right of self-representation does not exempt a party from compliance with relevant rules of procedural and substantive law." *Dersh v. Derozier*, 851 F.2d 1509, 1512 (5th Cir. 1988).

IT IS THEREFORE ORDERED that Plaintiffs' Motion for More Definite Statement is hereby DENIED.

Appendix - I: cont.

SIGNED AND ENTERED this 16 day of April, 1996.

"s/James R. Nowlin"
JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

"11"
(this number hand written bottom page 1)
- Clerk's Docket Number -

APPENDIX - J:

COMPLAINT

FILED STAMP:

FILED
Dec 28 4:45 PM '95
U.S. CLERK'S OFFICE
BY "s/__ DEPUTY

DOCKET NUMBER STAMP: A 95 CA 850 JN **

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

William N. and Emma G. Johnson III
Plaintiffs
V.
CIVIL ACTION NO.__**__

INTERNAL REVENUE SERVICE
Margaret M. Richardson; IRS - Commissioner
Michael L. Killfoil; . IRS - District Director
Sandra L. Wise; . . . . IRS - Problem Resolution Specialist
Defendants

COMPLAINT

1. Allegation of jurisdiction.
Under TITLE 28, UNITED STATES CODE, JUDICIARY AND JUDICIAL PROCEDURE, Ch. 85 - DISTRICT COURTS; JURISDICTION;

Sec. 1346 United States as defendant.
(a) The district courts shall have original jurisdiction of:
(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected

without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

2. Parties.

a. Plaintiffs:

NAME: William N. and
Emma G. Johnson III
ADDRESS: 1710 E. Oltorf; Apt. 737
Austin, Tx. 78741 - 3839

b. Defendants:

NAME: Internal Revenue Service
Margaret M. Richardson;
Commissioner
ADDRESS: Department of the Treasury
Internal Revenue Service
Washington, D.C. 20224

NAME: Michael L. Killfoil;
District Director IRS
ADDRESS: Internal Revenue Service
STOP 1000 AUS.
300 E. 8th St.
Austin, Texas 78701

NAME: Sandra L. Wise;
Problem Resolution Spec.
ADDRESS: Internal Revenue Service
STOP 1000 AUS.
300 E. 8th St.
Austin, Texas 78701

3. Statement of claim.

CLAIM OPENING STATEMENT

PART 1:.................................

The IRS has collected taxes and is continuing to try and collect additional taxes from us for the tax years 1988, 1989 and 1990. The IRS collection of claimed unpaid taxes owed by us for the tax year 1989 is not the issue of this law suit, but only a factor of it. The issue of this law suit is the fact that the IRS has calculated taxes owed and has collected and is trying to collect taxes under two (2) different primary taxpayer Social Security Numbers (SSN) files for the tax years 1988, 1989 and 1990. One IRS file has my wife (Emma G. Johnson - EGJ) as the PRIMARY TAXPAYER (single) under her SSN as the file ID number only. The other IRS file has me (William N. Johnson III - WNJ) as the PRIMARY TAXPAYER (married) and my wife as the spouse with us filing a joint Income Tax Return under my SSN as the primary number (file ID number) and my wife's SSN as the spouse. In allowing this to happen without correcting the initial mistake the IRS has double taxed us for most of our 1988 tax year income, therefore constituting the illegal act of DOUBLE TAXATION and the cause of this law suit. See Definition "DOUBLE TAXATION" Page 4, Fact 1.

PART 2:.................................

The IRS has withheld refunds due us from other tax years so to pay for their illegal double taxation actions. The actions of some IRS employees have turned what the IRS has told me was a simple mistake into a simple misunderstanding. That simple misunderstanding is in fact the illegal act of DOUBLE TAXATION. We strongly disagree that it is just a simple misunderstanding! We feel the actions of the IRS were, and continue to be, nothing less than total incompetence and total disregard of their duty to assure that no undue forces, tactics and/or methods such as intimidation are used in collecting either legally or non legally owed taxes from taxpayers. We have invested a great amount of time and funds over the past three (3) years trying to correct this problem with the IRS, as the facts of this case will show. The IRS is currently levying my wife's (EGJ) wages to pay for back taxes which the IRS claims she owes under her SSN. We refused to pay any additional income taxes which we know are not owed by us, or the IRS can not prove to us are owed, just by stating we owe those taxes. This includes being pressured into submitting to pay any taxes which we feel are not legally owed by us. We have informed the IRS of this fact many times (by different methods) in an attempt to get the IRS to correct the problems without the need for us to take legal action, but to no avail.

PART 3:...................................
The IRS has told me (WNJ) - more than once - that we didn't owe some of the taxes they have collected or claimed we owed. Still the IRS is continuing to pursue the collection of those taxes by currently levying my wife's wages. Therefore, the facts and evidence will show that we have no choice but to bring legal action - in the form of a law suit - against the IRS, so to stop their actions and settle this major problem of ours once and for all.

Fact 1. Definition - "DOUBLE TAXATION".
The taxing of the same item or piece of property (wages/money) twice to the same person.

To constitute DOUBLE TAXATION, two taxes must be imposed on same property (EGJ's yearly wages) by same governing body (IRS) during same taxing period (1988 tax year) and for same taxing purpose (personal income tax).

Fact 2. Prior to the 1988 tax year, we filed a legal joint Income Tax Return for each year we were married - 1978/1987.

Fact 3. In May 1988 I (WNJ) was informed by the IRS that our personal 1986 Income Tax Return was to be audited. That audit became a law suit file by me (WNJ) against the IRS. It took over 2½ years before I agreed to the IRS request to settle that law suit out of court, even though the IRS had used improper and/or illegal actions against us.

Fact 4. I was told by an IRS employee - more than once - in August 1989 that we did not have to file an Income Tax Return for the 1988 tax year, if in fact I (WNJ) was sure we did not owe any additional taxes for that year. I was told this while we were preparing our personal 1988 Income Tax Return to be filed. After being told this by the IRS employee we stopped working on that tax return, so I could continue to better address the IRS 1986 audit.

Fact 5. We informed the IRS many times during phone conversations and by written correspondence, and even in person, of the reasons why we could not and/or did not file our personal 1988 Income Tax Return by the date the IRS stated we should have - that date being April 15, 1992.

Fact 6. The first notice we received from the IRS was a form letter date 09-10-90 requesting my wife (Emma G. Johnson) to file her 1988 Income Tax

Return - Form 1040 under her Social Security Number (SSN). This was the beginning of the IRS's Tax Case File on my wife under her SSN being the Primary Taxpayer ID Number.

Fact 7. The IRS computed a personal 1988 Income Tax Return for my wife (EGJ) under her SSN and sent her a form letter dated 05-10-91 stating she owed taxes of $1,783.64.

Fact 8. We filed (mailed) our personal joint 1988 Income Tax Return on February 16, 1994 under my (WNJ) SSN as the primary taxpayer ID number and my wife's SSN as the spouse taxpayer number. That return showed we owed no tax for the 1988 tax year, and the IRS had withholdings of $1,771.96 collected under my wife's SSN for wages paid to her by her employer.

Fact 9. When we filed our 1988 Income Tax Return on February 16, 1994 we enclosed a seven (7) page statement dated February 15, 1994 for the purpose of informing the IRS about some facts pertaining to our late filing of that income tax return. See Exhibit "A".[1]

Fact 10. We also mailed a copy of that February 15, 1994 statement to the IRS District Director. See Exhibit "A".

This Footnote not part of Original "COMPLAINT"

[1] - All exhibits referenced in this document (Petitioners' Complaint) are not included, but can be provided (in original form) upon request by this U.S Supreme Court.

Appendix - J: cont

Fact 11. We received a letter dated March 7, 1994 from Ms. Sandra L. Wise, IRS - Problem Resolution Specialist, stating that the IRS District Director Mr. Michael L. Killfoil asked her to research our special problem.

Fact 12. The IRS informed us that the 1988 tax withholding amount of $1,771.96 would not be refunded to us because we did not file our joint return prior to April 15, 1992.

Fact 13. We received a three (3) page letter dated March 28, 1994 from the IRS - District Director Mr. Michael L. Killfoil stating we would not be getting a refund for our joint 1988 Income Tax Return. See Exhibit "B".

NOTE:

At this point in time both Mr. M.L. Killfoil and Ms. S.L. Wise had to know that we had already filed our joint personal 1988 Income Tax Return under my SSN and we owed no additional taxes for that tax year. But the fact is that the IRS continued to pursue a tax collection case action against my wife (EGJ) under her SSN.

Fact 14. On August 13, 1994 we filed our joint personal 1993 Income Tax Return, which showed we were due a refund of $1,332.93. We stated that the refund due us be carried forward to the 1994 tax year.

Fact 15. On October 5, 1994 I (WNJ) called IRS and talked to a Ms. Hill in reference to an IRS letter dated

September 26, 1994. In that letter the IRS claimed my wife (EGJ) - under her SSN - still owed taxes of $1,096.58 for the tax year 1988, after they (IRS) credited our joint 1993 refund of $1,332.93 - under my (WNJ) SSN - to my wife's IRS Case. This is over seven (7) months after we had filed our joint personal 1988 Income Tax Return showing we owed no tax for that year. Ms. Hill told me that the IRS had made a mistake and she knew exactly what needed to be done to fix the problem. Then Ms. Hill told me that our file showed that our case had been referred to the IRS Problem Resolution the day before - being Oct. 4, 1994 - and they should be contacting us soon about this issue. Ms. Hill checked to make sure our address had not changed and then she asked for our phone numbers at the apartment and our ranch home plus my wife's (EGJ) work phone number, which I gave her. We were never contacted about this problem issue by the IRS.
See Exhibit "C".

Fact 16. We filed our joint personal 1994 and 1991 Income Tax Returns on April 14 & 15, 1995. Both returns showed we were due refunds for 1991 = $1,616.81 and 1994 = $1,722.15 for a total of $3,338.96 plus interest.
See Exhibit "D".

Fact 17. In May 1995 I (WNJ) became seriously ill due to blood clots forming in my left leg and both lungs which required me to be hospitalized. Due to the damage the blood clots caused to both my lungs and my left

leg, I was put on a strict mobility rest condition at home.
See Exhibit "E" - Physician's letter dated Oct. 25, 1995.

NOTE:
My (WNJ) medical health restricted physical mobility condition have caused problems which have limited me in addressing many of the IRS wrongful actions against my wife and I, plus my trying to properly prepare this law suit. This is the main reason why this law suit has not been prepared and filed sooner. As of December 14, 1995 my physical condition relating to my medical condition is continuing to worsen due to my having to prepare this law suit complaint on a computer. I informed Ms. Wise of my medical problem, during our phone conversation of October 23, 1995, but she made no comment about it at all. I don't think she believed me.

Fact 18. On October 23, 1995 my wife (EGJ) was notified by the personnel department of her employer (Texas Dept. of Mental Health and Mental Retardation - TDMHMR) that they had received an IRS - 'Notice of Levy on Wages, Salary, and Other Income'. She phoned me at home and I told her to get the notice and bring it to me. She obtained the notice and brought it to me at lunch. The IRS Notice stated that she (EGJ) owed - under her SSN - unpaid taxes of $1,701.30 for the tax year 1990.
See Exhibit "F".

STATEMENT:...............................
We have made many attempts to correct the problem of the IRS having two taxpayer files under different primary taxpayer SSNs for my wife (as a single taxpayer) and for us (as joint taxpayers) over the past 3 years with no success. There is not a need by the IRS to collect - through the use of a Levy on my wife's wages - any additional tax funds from us for taxes which the IRS claims my wife (EGJ) owes under her SSN for a past tax year.

Fact 19. As of October 23, 1995 - and for the preceding 6 months -we had not legally owed any personal income tax for any past tax year. In fact, the IRS owed us - as of that date - an undetermined refund amount for the tax years (1991 and/or 1994) we had filed back in April 1995. See Fact 16.

Fact 20. In an attempt to once again resolve this problem caused by the IRS, I called Ms. Sandra L. Wise on October 23, 1995 at her office. I informed her of the situation - the IRS levy on my wife's wages at her job - and requested her assistance in correcting this problem. I also told Ms. Wise about my (WNJ) phone conversation with Ms. Hill (see Fact 15.) on October 5, 1994 and that Ms. Hill seemed to clearly understand the problem with the IRS about the 1988 tax year issue. I then told Ms. Wise that Ms. Hill told me that the issue had been referred to the IRS Problem Resolution the day before (Oct. 4, 1994), and that we never were contacted about the matter. Ms. Wise said that she did not understand why we had not been contacted by the Problem Resolution people, but she would look into it. I requested the opportunity to meet with her or someone in order to resolve this matter without having to file a law suit. Ms. Wise flatly informed me that there was nothing she could do for me. She (SLW) had done all that she could, and if I wanted to file a law suit then that was my right, but it would do no good - we had no chance of winning - for many other taxpayers had filed law suits and did not win. I ask if the IRS was going to proceed with the levy on my wife's wages? Ms. Wise informed me yes. Ms. Wise told me that she would send me some transcripts showing how our joint 1991, 1993, and 1994 Income Tax Return refunds had been applied - what tax years those refunds were allocated to, so to pay the IRS claimed unpaid taxes for 1988, 1989 and 1990 tax years under my wife's SSN. Ms. Wise also told me that she would call Ms. Mary Blum - the IRS Revenue Officer handling the IRS Levy on my wife's (EGJ) wages.

Fact 21. I (WNJ) received the transcripts from Ms. Wise on October 28, 1995. On studying those transcripts I confirmed that the IRS had indeed double taxed us for the tax year 1988.

NOTE - 1:
We filed a 1988 joint return with my (WNJ) SSN 461-74-5364 being the Primary Taxpayer ID number and my

wife's SSN 465-86-5571 being the spouse. The income on that return showed my wife's total wages earned of $22,660.95, plus work bonus income of $15.00, plus interest incomes of $402.55 and $90.23 for a total of $23,168.73. That return showed we had a total tax withholding of $1,771.96 and our taxable income for 1988 was $2.11. Therefore, we owed no income tax for 1988, and we could have filed a request to have the $1,771.96 withholdings refunded to us. See Exhibit "G".

NOTE - :2
The IRS' prepared 1988 tax return under my wife's SSN 465-86-5571 showed my wife as a single taxpayer with an Adjusted Gross Income total of $23,167.00 (I have no idea where the $0.73 went). The IRS tax return showed a credit from withheld taxes & excess FICA of $1,771.00 (again I have no idea where the unaccounted $0.96 went). The IRS return shows an Additional Tax Assessment of $2,783.00 plus penalty and interest assessment. It also showed that the unpaid tax owed was collected from another taxpayers account (no account number given) for the sums of $1,332.93 and $1,144.63 - therefore eliminating the refund due from that joint income tax return filed by us. There was no reference to my (WNJ) SSN whatsoever, or the fact that my wife was not a single taxpayer and had in fact filed a joint 1988 Income Tax Return. See Exhibit "H".

Fact 22. On November 1, 1995 at about 3:40 p.m. I (WNJ) received an unexpected phone call at our Austin apartment from Ms. Sandra L. Wise (defendant). Ms. Wise told me that the reason she was calling me was to tell me that she had not realized we had filed a joint personal 1988 Income Tax Return the last time we talked - back on Oct. 23, 1995. Ms. Wise stated this more than once during that phone conversation. Ms. Wise also informed me that because she now realized this fact then the IRS should not have put a levy on my wife's (EGJ) wages, and she was going to have to correct the mistake, and we should be getting a refund of the amount remaining after the mistake was corrected. Ms. Wise also told me that she would be contacting Ms. Mary Blum about stopping the levy on my wife's (EGJ) wages - under her SSN. Ms. Wise then told me that this matter would be taken care of on or about November 20, 1995, and she would call me to let me know when it had been done.

NOTE:

We do not believe Ms. Wise when she said she misunderstood or did not realize we had indeed filed a joint personal 1988 Income Tax Return during our Oct. 23, 1995 phone conversation. I stressed and mentioned this fact many times during that Oct. 23, 1995 phone conversation. Plus, our February 15, 1994 statement - 7 pages (see Fact 9 & 10 and Exhibit "A") - made this point absolutely clear. Also, I told Ms. Wise all about the phone conversation with Ms. Hill on October 5, 1994 (see Fact 15.) and what Ms.

Hill said needed to be done to fix the problem. Ms. Wise even told me (WNJ) that what Ms. Hill said needed to be done to fix the problem was indeed correct, and during the November 1, 1995 phone conversation Ms. Wise told me she would do it. My wife and I did not believe that this problem would be corrected by Ms. Wise. We hoped however it would be. As it turned out we were correct. This problem was not corrected by Ms. Wise as she said it would be.

Fact 23. After my conversation with Ms. Wise on November 1, 1995 my wife and I decided to hold off on proceeding with the IRS law suit at that time. The main reason we chose to hold off filing a law suit was due to my medical condition and the physical harm and danger that would exist from my having to physically perform required functions and duties needed to properly pursue a law suit. Such as preparing the COMPLAINT on a computer, which requires me to sit in a chair for long periods of time. Sitting in a chair causes my left leg to swell and become painful. It also keeps my left leg blood veins from healing.

Fact 24. On December 6, 1995 my wife (EGJ) was once again notified by the personnel department of her employer (TDMHMR) that Ms. Mary Blum (the IRS Revenue Officer handling the IRS levy on my wife's wages) had contacted them by phone and had also faxed some documents to the personnel department for the purpose of having all my wife's December and January wages sent directly to the IRS instead of being paid to my wife. The IRS was taking this action so to collect unpaid taxes for the tax year 1990. My wife was told by the personnel department there was nothing they could do, but to comply with the IRS notice.

Fact 25. As of December 20, 1995 at 11:59 pm. we have not been contacted by Ms. Sandra L. Wise. Reason unknown to us at this time.

STATEMENT:..............................

My wife and I have very strong feeling about personal rights as individuals and as Americans. My wife and I also have very strong feelings about right and wrong, and in no way can we justify many of the IRS actions taken in our case as being right under what America stands for - or should stand for. Therefore, due to all the facts stated in this Complaint, and some other facts which are not stated in this Complaint, we now feel that we have to proceed with our civil law suit against the IRS and the other defendants - the IRS; Ms. Margaret M. Richardson, Commissioner; Mr. Michael L. Killfoil, District Director; and Ms. Sandra L. Wise, Problem Resolution Specialist. The reason we have named these 3 individuals is simple. We strongly believe that a person should be held accountable for his or her actions when that person causes harm to another, no matter whether that person is acting in a job capacity or as an individual. This is mainly what we feel Civil Law is all about, or should be.

Fact 26. Ms. Margaret Milner Richardson, Commissioner - IRS is named as a defendant in this civil law suit due to the fact that she has made many public statements about what she has done and will do in the future so to improve the operation of the IRS. Some of her statements were:

1 - Errors by both the IRS and taxpayers, represent rework at a significant cost and burden to the service, and possible cost and burden to the taxpayers, if we have to contact them in order to correct them (errors).

2 - Another way we are changing the way we do business is by finding new and better ways to interact with taxpayers. Recognizing that correspondence is labor intensive, costly, and burdensome. The IRS is focused on making significant - meaningful improvements to our telephone operation. We do believe that the taxpayers should be able to get through to the IRS on their first call, and they should be able to have their issues resolved on that call.

3 - ...even though we have made progress with the way we interact with taxpayers, we are currently aware of the fact that we can and must do more.

4 - ...the IRS is also charged with enforcing the law, both civil and criminal. And collecting taxes that are not paid voluntarily. Although it is only

one of our lines of business, our compliance function is probably the best known part of what the IRS does. We estimate that about 83% of the taxes due are paid voluntarily. Another 3.5% - or a total of 86.5% - is collected annually through compliance and enforcement efforts.

5 - ...we also know that examination, collection action, and criminal investigations are - and I fear always will be - essential to demonstrate to those who do comply with the tax law that those who do not comply with be caught.

6 - Because we understand, and feel very strongly, that taxpayers must be informed if they are going to file accurate and complete returns. I often say that the front end of compliance really is our taxpayer service function.

7 - Since 1990 the IRS has steadily increased its efforts to control refund fraud. Significantly more fraud has been identified and stopped by the IRS and more new schemes have been identified.

8 - We have spent a lot of time, both before the filing season began and since it got underway, encouraging taxpayers to use accurate social security numbers.

9 - We are, as we have repeatedly said, we would be doing, slowing down the process to allow us additional time to verify

refunds. We estimate that as many as 8% will be delayed.

10 - ...and fourth we want to take vigorous action when we uncover fraud. Working with the Department of Justice and the US Attorneys we are actively pursuing criminal violations.

STATEMENT:..............................
These kind of statements, we believe, show that the IRS is trying to change the general negative feelings of the American people about the IRS and its function. While in fact we feel that actions speak louder than words, the actions which the IRS have taken in our case over the past 7 years, and especially the past 3 years, have shown us that indeed the IRS has not changed. Therefore, we intend to SUBPOENA the IRS - Commissioner Ms. Margaret Richardson, to testify in court about her statements and purpose for making them.

Fact 27. Mr. Michael L. Killfoil, District Director - IRS is named as a defendant in this civil law suit due to the fact that he failed to perform his job and did not attempt to correct improper actions taken by the IRS against us for the double taxation of my wife's (EGJ) wages for the 1988 tax year. In his (MLK) letter to me, dated March 28, 1994, (Exhibit "B") he said on page 2 paragraph 4, "Filing these returns at this point would reduce the tax obligation as assessed by allowing the exemption for the spouse and the election to file married filing joint. Any deductions or expenses would also be considered."

Point 1.
Mr. Killfoil knew that the IRS had issued a report - tax action case - against my wife - Emma G. Johnson for her 1988 wages from TDMHMR and interest income for 1988 as well. He also knew that we (my wife and I) had filed a joint personal Income Tax Return for the 1988 tax year.

Point 2.
Mr. Killfoil knew that some of our actions pertaining to filing our income tax returns were based on some very important facts which I stated in the 7 page February 15, 1994 statement (Exhibit "A" - see page 5, ISSUE II: Facts #2 & page 6, #8). Mr. Killfoil made no attempt to check and see if the facts stated in the statement were true or false, and if they were true how those facts would affect our IRS case or problems.

STATEMENT:............................
We believe Mr. Killfoil did not dictate, or write, or read his letter dated March 28, 1994 to us, but merely signed it. If that is what happened, then Mr. Killfoil should be held accountable for his actions for he was the authority for the letter and its intended purpose. If on the other hand Mr. Killfoil did indeed know what the letter said, then he still should be held accountable for his actions for he mainly contributed to authorizing the illegal act of double taxing Americans - my wife and I. Thereby directly causing great hardship and problems for us.

Fact 28. Ms. Sandra L. Wise, IRS - Problem Resolution Specialist is named as a defendant in this civil law suit due to the fact that she failed to perform her job and did not attempt to correct the illegal double taxation of our 1988 tax year returns. Then Ms. Wise failed to follow through with her promise to correct the double taxation problem as she stated she would do during our phone conversation of November 1, 1995 (See Fact 22). Also, Ms. Wise failed to take responsibility for her part of the illegal double taxation of our 2 tax cases when I confronted her with the fact. I ask Ms. Wise, during our November 1, 1995 phone conversation to write us a letter stating that the IRS had indeed made a mistake in levying my wife's wages and improperly addressing our 1988 tax problem. Ms. Wise strongly said "No", she would not do it. I (WNJ) then told her that the IRS rules state that we were due such a statement. Ms. Wise did not believe me, so I read her the IRS statement which says "We will issue a certificate of release of an incorrect lien that includes a statement that we filed the Notice of Federal Tax Lien in error." Ms. Wise then said something to the affect that she had never heard nor read that rule before. Then Ms. Wise said that it was not her responsibility to write that error statement, that it was Ms. Mary Blum's responsibility. Many of the facts pertaining to Ms. Wise's actions have already been stated. Because the evidence we have in this case will show that Ms. Wise tried to cover up her knowledge of the double taxation by saying she misunderstood the facts of our IRS case, and because of her incompetent actions in properly addressing our problem - in performing her job -we will ask the court to hold Ms. Sandra L. Wise directly and personally responsible for her part of the damages and harm caused us in having to pursue this law suit.

4. Relief.

We want relief from the IRS's illegal, deliberate, and unconscionable actions stated in this complaint. We seek that relief in five ways: (1) a Court Order directing the IRS to immediately address and correct the illegal double taxation problem caused us; (2) a Court Order directing the IRS to extend the filing deadlines for the tax years 1989, 1990, and 1992 for three years from the date this complaint/law suit is settled, so we will have ample time to properly prepare those joint Income Tax Returns; (3) award us tax free compensation for Actual, and Consequential, and Continuing, and Irreparable Damages for the sum of $193,149.99 plus any additional damage amounts incurred by us prior to and after this complaint is filed; (4) also award us tax free Punitive damages for the sum of ten times the total of all other damages and awards combined; and (5) a Court Order directing the IRS to pay for twelve (12) televised sixty (60) second national public service apology spots on ABC, CBS, FOX, and NBC at the times and dates chosen by us. These public apology spots will address the IRS' actions which caused us harm and damages over the last 3 years.

5. Motion For - TEMPORARY RESTRAINING ORDER ("TRO").

I. PURPOSE OF "TRO" - Plaintiffs Request To Stop IRS Levy Action.

Plaintiffs request the court to grant this Temporary Restraining Order and instruct the IRS, Ms. Mary Blum the IRS Revenue Officer handling the levy, to immediately stop proceedings with any and all levy actions to collect any funds and/or property (of any type) from taxpayer Mrs. Emma G. Johnson - Social Security Number (SSN) 465-86-5571. Plus, if any funds have been collected, under the IRS filed "Notice of Federal Tax Lien" S.N. 749517691 (August 05, 1995), then those funds are to be returned immediately to Mrs. Johnson.

II. VALIDITY OF "TRO" - IRS Levy Not Legal.

The validity of this Temporary Restraining Order, requested by the plaintiffs, is very simple. The IRS Levy addressed in this "TRO" IS NOT LEGAL. The IRS Levy is not legal because the IRS "Notice of Federal Tax Lien" - filed on August 5, 1995 - was not legal. The reason the IRS Lien was not legal is also very simple. The plaintiffs (which Mrs. Johnson is one) did not owe any additional taxes for the tax year 1990 when the IRS filed the Lien and stated Mrs. Johnson did owe additional taxes for the tax year 1990. Therefore the IRS Lien was not legal.

III. NEED FOR "TRO" - Limit Plaintiffs' Damages Caused By IRS Levy.

If this "TRO" is not approved, or is delayed by the court or the plaintiffs will suffer damages - both short and long term - directly attributed to the IRS Levy collected (non owed tax) funds from Mrs. Johnson's December 1995 and January 1996 wages

IV. NEED TO EXPEDITE "TRO" - IRS Levy Action Already In Progress.

Ms. Mary Blum (the person handling the IRS Levy) has already instructed Mrs. Johnson's (plaintiff) employer - the Texas Dept. of Mental Health and Mental Retardation (TDMHMR) - to send all of Mrs. Johnson's December and January wages to the IRS. We feel the best way to stop this IRS Levy is to expedite this "TRO" without delay. If the IRS wants to object to this "TRO", then a hearing before the court can be scheduled. The "TRO" delay will not eliminate the IRS' ability to collect funds found to be owed by the plaintiffs.

6. Juror Trial.

We demand a trial by jury consisting of twelve members as TITLE 28, UNITED STATES CODE, JUDICIARY AND JUDICIAL PROCEDURE - Chapter 161, Section 2402. Jury trial in actions against United States.

> Any action against the United States under section 1346 shall be tried by the court without a jury, except that any action against the United States under section 1346(a)(1) shall, at the request of either party to such action, be tried by the court with a

> jury. This is the section which this complaint is brought under.

7. Closing statement.
We do not believe that any law, or official government code or rule should permit any person, including a government employee or agency, to take any intimating action directly or indirectly causing harm to another person(s) and not be held accountable for their act, or non actions (when an action is called for) due to a non specific blanket of immunity protection. Every government agency and/or its employees should be held accountable to those harmed by any action taken under their endowed authority.

This is best pointed out in two documents which address the issue of a government abusing its endowed powers. Those documents are the Declaration of Independence and the Constitution of the United States. An example is within the equity of the Constitution of the United States under the Preamble.

> "WE, THE PEOPLE of the United States, in order to form a more perfect union, ESTABLISH JUSTICE, insure domestic tranquility, provide for the common defense, promote the general welfare, and SECURE THE BLESSINGS OF LIBERTY to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

Therefore, any action(s) by our government which conflicts with the sovereignty of the people's right to liberty and general welfare should not be allowed to continue or exist. It is the duty of every American to pursue and correct any wrongful actions by our government!

We believe under penalty of perjury that the foregoing is true and correct.

Signed this 28 day of December, 1995

/s/______________________________
William N. Johnson III

/s/______________________________
Emma G. Johnson

Address: 1710 E. Oltorf; Apt. 737
Austin, Tx. 78741 - 3839
Telephone No.: (512) 445 - 2380

NOTE - PETITION FOR WRIT OF CERTIORARI
Both Plaintiffs/Petitioners did sign the "COMPLAINT".

APPENDIX - K:

REPLY BRIEF OF APPELLANTS - CIVIL ACTION
RELEVANT DOCUMENT - FEDERAL APPEAL COURT

FILED: U.S. COURT OF APPEALS
FEB. 6, 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE 5TH CIRCUIT

No. 97-50535

WILLIAM N JOHNSON, III; EMMA G JOHNSON
Plaintiffs-Appellants,
v.

INTERNAL REVENUE SERVICE, Department of the Treasury, Washington DC; and
MARGARET M. RICHARDSON, Commissioner of the Department of the Treasury; and
MICHAEL L. KILLFOIL, District Director, Internal Revenue Service; and
SANDRA L. WISE, Problem Resolution Specialist, Internal Revenue Service
Appellees - Defendants

- -

Appeal from the United States District Court for the Western District of Texas

- -

REPLY BRIEF OF APPELLANTS - CIVIL APPEAL
William N. Johnson III and Emma G. Johnson

- -

William N. Johnson III, Pro Se
Emma G. Johnson, Pro Se

BY: William N. Johnson III
1710 E. Oltorf, Apt. 737
Austin, Texas 78741-3839

Appendix - K: cont.

CERTIFICATE OF INTERESTED PERSONS AMENDED

Plaintiffs/Appellants[1] certify that to their current knowledge only two individuals may have become interested in the outcome of this case since the Plaintiffs filed their initial BRIEF with the Court. Plaintiffs make these additional representations in order that the members of this Court may evaluate possible disqualifications or recusal.

United States Attorney San Antonio, Tx. office:	James William Blagg[2]
Assistant U.S. Attorney for Dept. of Justice, Tax Division Appellate Section Washington, D.C. office:	Bruce R. Ellisen[3]

[1] - Plaintiffs/Appellants hereafter referred to as either Plaintiffs or specific Plaintiff Mr. and/or Mrs. Johnson.

[2] - Defense counsel referenced Mr. Blagg in their letter of January 16, 1998 to Mr. Charles R. Fulbruge III: Clerk - 5th Cir. Court of Appeals, page 2.

[3] - Defendants have added U.S. Attorney Mr. Ellisen as Co-Counsel in this appeal.

PRELUDE TO PLAINTIFFS' REPLY BRIEF

Purpose Statement:

Plaintiff Mr. Johnson - acting Pro Se - understands that the inclusion of a "PRELUDE" in any legal document is not a standard practice and Plaintiff would not have included this one if it would not serve a very special and unique purpose. That purpose is to assist the Appeal Court in its interpretation and clarification of the facts and issues henceforth addressed in this and other documents pertinent to the Plaintiffs' Appeal.

Many of the issues are criminally related in nature to the civil issues before this Appeal Court. Issues of actions by the government and/or its employees which occurred prior to or after the Plaintiffs filed their "COMPLAINT". Issues which should have (and could have) been addressed and resolved in the Lower Court, if the case had been adjudicated properly by the Court in following the Federal Rules of Civil Procedure (FRCP). If the Lower Court had provided all parties a fair and just judicial administrative process of the case for its issues, and had not failed in its duty to provide the Plaintiffs their right to "Due Process" under the 5th Amendment of the U.S. Constitution, then this case may not have been submitted to this Appeal Court for review. The failure of the Lower Court to adhered to the judicial rules and rights of the parties is the main point of issues for this Appeal. The criminal issue is the main reason for Plaintiff Mr. Johnson having to submit this non-typical "Plaintiff Reply Brief" in direct response to the Appellees' Brief, and thus the need for including this "PRELUDE".

Dilemma Statement:

Plaintiffs started considering that some actions by one or more of the Defendants were criminal in nature. This assumption led Plaintiff Mr. Johnson to start researching the relevance of those actions to criminal law. Once Plaintiff Mr. Johnson had determined that at least one of the Defendants' actions was in fact criminal in nature he next had to research what action could and should be taken in addressing this matter. Unable to find any precedent or legal authority addressing a situation such as theirs - a civil case were the government is the Defendant perpetrating (in one way or another) criminal actions against the Plaintiff(s) -the Plaintiffs had a dilemma to resolve.

Dilemma - how should this matter be properly addressed, taking into account all the relevant facts of their case over the past 10 years and the newly acquired knowledge and understanding of the judicial system? Also, in Plaintiffs considering how to correctly address this matter another very important issue had to be taken into account. The issue of the Plaintiffs' actions effecting, or hampering, or compromising a later criminal investigation.

The Plaintiffs determined they had three choices in how to address this matter: 1st choice - drop the suit; 2nd choice -maintain the suit, but do not pursue criminal matter; and the 3rd choice - pursue the criminal matter separately from the suit untill both sides had filed their briefs in the appeal, then consider what appropriate action to take, if any. The Plaintiffs chose number 3 mainly due to their strong belief in **RIGHT DOES NOT KNOW MIGHT!**

Method and Intent Statement:

Plaintiffs understand, as does the Appeal Court, that in matters which are both criminal and civil in nature the criminal issue takes precedent over the civil issue, as it should. It's for this reason Plaintiff Mr. Johnson will only address an issue to the extent of its civil nature facts pertinent to appeal, and not the facts pertinent to the criminal nature. The reason this method was developed is simply this: if Plaintiff was to fully address an issue for its related criminal nature then that provided additional information could possibly compromise any future criminal investigation of the issue or person, and thus disserve justice.

The Plaintiffs' know for a fact that one government employee has committed at least one illegal act - pursuant to the TITLE 26, Internal Revenue Code - in regard to this case prior to the filing of the "COMPLAINT". Plaintiffs also highly suspect that other illegal/criminal acts have occurred after Plaintiffs' "COMPLAINT" was filed. The Plaintiffs have not been delinquent in addressing the illegal and/or criminal issues of this case. Plaintiffs contacted at least one government entity empowered with the authority to investigate one or more of the illegal or the criminal issues relating to this case. The reasons Plaintiffs have not addressed the criminal issue(s) with this Appeal Court - prior to now - but will be addressed when Plaintiff Mr. Johnson files his "Plaintif Motion For Writ Of Irregular Process" with the Court.

Plaintiff Mr. Johnson is not attempting to circumvent the Appeal Procedure Rules or their purpose by taking this unique action.

RE-STATEMENT REGARDING ORAL ARGUMENT

Oral argument was requested by Plaintiffs in their initial BRIEF,[4] while Defendants/Appellees[5] stated in their BRIEF FOR THE APPELLEES [6] they felt oral argument in this case is not necessary.

Plaintiffs **strongly feel** that oral argument is necessary for the primary purpose of helping to insure that justice will be properly served in this Court. The briefs alone in this case may not clearly portray the true importance of the case events and/or actions in the lower Court for best serving justice. If only one issue is better served/reviewed by the Court for holding oral arguments, then justice will be better served - no matter which side it benefits. Plus, another major reason in support of the Court's need for oral argument is the fact that there are many discrepancies in this case caused by the parties and/or their counsel, of which some are noted in this REPLY BRIEF OF APPELLANTS.[7] Many of those discrepancies were and continue to be -it seem to Plaintiffs - intentional. Our judicial system does not just support the Court's consideration of such actions, it demands it!

[4] - "(P/A-Br: x)" references are to Plaintiffs'/Appellants' initial BRIEF and "x" page number(s) referenced.

[5] - Defendant(s) /Appellee(s) hereafter referred to as either Defendants or specific Defendant (last name).

6 - "(D/E-Br: x)" references are to Defendants'/Appellees' initial BRIEF FOR THE APPELLEES and "x" page number(s) referenced.

7 - "(P/A-R.Br: x)" references are to Plaintiffs'/Appellants' REPLY BRIEF and "x" page number(s) referenced.

REPLY TO DEFENDANTS' STATEMENT OF JURISDICTION

Defendants state on page 2 of their brief that: (D/E-Br: 2)

> The complaint sought injunctive relief from tax collection and compensatory and punitive damages. (1R. 20,21.)

Plaintiffs did not ask nor seek from the Lower Court a **relief from tax collection** as the Defense Counsel has incorrectly - and Plaintiffs feel intensely - portrayed in their statement. Nowhere in the Plaintiffs' COMPLAINT Sec. 4 - "Relief" does the Plaintiffs make such a request. (V-1: 20)[8] Also, under Sec. 5 - "Motion For - TEMPORARY RESTRAINING ORDER ("TRO") the Plaintiffs again make no such request or inference. The Plaintiffs' "TRO" did seek the Lower Court to take action in stopping the IRS from collecting any funds and/or property (not taxes owed - at time "COMPLAINT" was filed) from Plaintiff Mrs. Johnson. (V-1: 20, 21) A non-disputed fact of this case is that the Plaintiffs did not owe the IRS any taxes for many months prior to and at

[8] - All references to the record on appeal are made in the following manner: (V-x [volume number]: [page number])

the time the "COMPLAINT" and the "TRO" were filed in the Lower Court. Therefore, there could not have been any injunctive relief from tax collection for taxes not owed by the Plaintiffs at said time.

The Plaintiffs do not know of any legal way (statute, law or IRS code) which the IRS can collect funds and/or take property from a taxpayer that are not legally owed IRS at the time of taking. The fact that the IRS does take such actions does not legally justify the action. If such legal authority does exist then the Defendants should make this Court aware of it.

REPLY TO DEFENDANTS' STATEMENT OF THE CASE

Reply to:

1. Course of proceedings and disposition in court below

Defendants state on page 3 of their brief that: (D-Br: 3)

> The complaint sought compensatory and punitive damages related to problems arising from taxpayers having filed a late joint income tax return for 1988 after the IRS had issued a notice of deficiency (which was uncontested) and made an assessment against Mrs. Johnson for 1988 based on third party reports of her income. (1R. 20)

The issue here is the Defense inferring that the IRS' notice of deficiency (which was dated Aug. 05, 1991 addressing Plaintiff Mrs. Johnson's 1988 tax year case file) went uncontested by the Plaintiffs. This is a correct textual statement, but it is not a correct factual statement. Fact - the Plaintiffs did not specifically contest the Aug. 05, 1991 IRS issuance of a Notice of Deficiency in 1991 due to having not received the required notice that year. This very important fact is supported by the Plaintiffs' List Of; Expected Non-Expert And Expert Witnesses, And Proposed Exhibits At Trial filed June 4, 1996. (V-1: 101) [See Appendix - "A-6"] The Plaintiffs' exhibit P-38 states:

> P-38 DN Aug. 05, 1991
> Copy, IRS - "NOTICE OF DEFICIENCY" document (dated Aug. 05, 1991) enclosed with Response Letter from Ms. Francis Jaime's dated May 26, 1992 (P-44)[9]

Plaintiffs now claim they can not further address this very important fact issue (as one of many issues referenced in the "PRELUDE") at this time due to its related bearing to a criminal event(s) which the Plaintiffs are contending are pertinent to this case - outside this appeal.[10]

[9] - Incorrect reference in Plaintiffs' org. document: exhibit P-44 should be P-45, and the reference in P-45 should be P-44 not P-38.

[10] - Plaintiff Mr. Johnson will file a "Plaintiff Motion For Writ Of Irregular Process" pertaining to the criminal issues of this case and their importance to insure a fair and just judication of this Appeal before this Court.

Next issue, the Defendants state "Taxpayers also challenged a levy issued with respect to Mrs. Johnson's 1990 taxes. (1R. 21-22.)" (D/E-Br: 3). This is a correct statement. Plaintiffs stated in their "Complaint: Sec. 5 - Temporary Restraining Order ("TRO"), part II - Validity Of "TRO" - ..." was not legal, due to the fact that the Plaintiffs did not owe the IRS any additional taxes on August 5, 1995 when the Levy was filed in Travis County, City of Austin, Texas on Plaintiff Mrs. Johnson, for the tax year 1990. (V-1: 20 & 21) The legality of this IRS Levy issue is a fact which should have been addressed and properly decided in the Lower Court prior to the case being dismissed for lack of jurisdiction. Also, the Defendants state in their "Answer" that "Defendants deny that Plaintiffs are entitled to a Temporary Restraining Order as requested in paragraph 5 (all parts) of the Plaintiffs' Complaint. See 26 U.S.C. §7421." (V-1: 69) Next, Defendants stated in their "Answer" - "4-b. Defendants deny that Plaintiffs are entitled to any of the relief requested in paragraph 4 of the Plaintiffs' Complaint." (V-1: 69) One of the Plaintiffs' stated request in their Relief was "We want relief from the IRS's illegal, deliberate, and unconscionable actions stated in this complaint. We seek that relief in five ways: **(1) a Court Order directing the IRS to immediately address and correct the illegal** double taxation problem caused us; ..." The Lower Court did not address any actions of any Defendant in this case - wrongful or not - in its reviewing the case *de novo* prior to its judgement to dismiss all claims against the Defendants without prejudice. This in light of the fact, as stated above, the IRS has claimed

- more than once - that all corrected actions have been taken pertaining to the Plaintiffs tax years 1988, 1989, and 1990. That Defense claim is incorrect for many reasons. One of those reasons is the IRS Levy issued on August 05, 1995 against all property owned by Plaintiff Mrs. Johnson in Travis County for the total sum of $1,332.98 is still on file and valid. A certified copy (dated January 21, 1998) of that Levy is in Appendix. [See Appendix "B"] Plaintiffs suspect that the Defendants will claim they are not at fault here for the IRS Levy not being withdrawn. That the Plaintiffs should be held accountable for requesting the IRS to release the Levy. This is another issue which should have been addressed by the Lower Court in providing the Plaintiffs their "Due Process - Evidentiary Hearing", prior to dismissing the Plaintiffs' complaint.

Reply to:
2. Statement of facts

Defendants state on page 4 of their brief that: (D/E-Br: 4)

> "Taxpayers allege that because an IRS employee told Mr. Johnson that they were not required to file a return for 1988 if he "was sure that [taxpayers] did not owe any additional taxes for that year," they chose not to file a return for 1988." (*Id.*)

The issue here is that the Defense is inferring to the Court that Plaintiffs took their responsibility as taxpayers as being a non-important obligation. This is a total misrepresentation of the

Plaintiffs true concern for their obligation as Americans and taxpayers. The Plaintiffs clearly state in their "COMPLAINT" (Fact 4) the main reason for not filing their joint 1988 Personal Income Tax Return was due to Plaintiff Mr. Johnson feeling he should better address the (then current) IRS audit for the tax year 1986. (V-1: 4) In Fact 5 - the Plaintiffs state that they continued to inform the IRS of their reason for not having filed their 1988 return. The true nature of this issue is that the Plaintiffs never considered not filing their joint 1988 Income Tax Return, even after Plaintiff Mr. Johnson had been told they did not have to by an IRS person. This is a very important point to note here that not once did the IRS wish to try and determine if the claim made by Plaintiff Mr. Johnson had any basis of fact to it. Even Defendants Ms. Wise and Mr. Killfoil did not attempt to inquire about this issue, nor did any one else after Plaintiff Mr. Johnson submitted an indepth explanation of the issue facts in a letter to the IRS dated April 23, 1992. The Plaintiffs listed this letter as an exhibit. See Plaintiffs' Exhibit List P-44. (V-1: 102) and [See Appendix "C" - copy of letter ISSUE 1:]

The Plaintiffs feel they know the reason for the Defendants not wanting to address this issue, but can not address this issue any further here due to its relation to a criminal issue.

Defendants stated on page 4 of their brief that: (D/E-Br: 4)

> On August 10, 1993, Mrs. Johnson received a "Notice of Intent to Levy"; Mr. Johnson called the IRS

in response to the notice. (1R. 30) The Defendants then go on to state: (D/E-Br: 5)

> .... Mr. Johnson informed the person he talked to that he and his wife "were in the process of completing" their 1988 return and that they would not owe any tax for 1988. (1R. 30)

Next the Defendants state: (D/E-Br: 5)

> The levy was removed on September 30, 1993. (1R. 31)

What the Defendants fail to reference here in their Brief is what took place between the time Plaintiff Mr. Johnson phone call to the IRS on August 12, 1993 and September 30, 1993 when the IRS removed the levy.

Plaintiffs suspect that the Defendants are trying to depict the actions of the IRS in a very favorable light with the Court. The true nature of what the IRS did was not a very favorable action. These excerpts addressed here by the Defendants come from the Plaintiffs' letter to the IRS and the District Director dated February 15, 1994 - Exhibit "A" of "COMPLAINT", ISSUE III: IRS LEVY ON OUR BANK ACCOUNT - IRS Notice Of Levy Dated Sept. 7, 1993. The Plaintiffs were addressing how the an IRS employee told Plaintiff Mr. Johnson that a stop action would be put on the IRS Levy Action immediately and would not be lifted until after November or December, thereby, giving Plaintiffs ample time to file their 1988 Tax Return. That is not what happened. The fact is the IRS placed a lien on Plaintiffs' checking account on Sept. 21, 1993. The remainder of issue III addresses how difficult it was for

Plaintiff Mr. Johnson to get the IRS to remove the levy, after the IRS person promised to lift it many times. All the while the Plaintiffs funds were inaccessible, causing a financial hardship for the Plaintiffs.

The next issue is the Defendants statement that Plaintiffs "requested a refund" (1R. 5.) due to the filing of Plaintiffs 1988 Tax Return on page 5 of the "COMPLAINT". This is incorrect. Nowhere on page 5 of the Plaintiffs' "COMPLAINT" does such a request appear.

Defendants continue to depict the attitude of the Plaintiffs as being hostile towards the IRS. They do this by stating:

> "taxpayers warned that they intended to bill the IRS for, ..." (1R. 25, 31)

Nowhere on either of the referenced record pages did the Plaintiffs issue a warning to the IRS. Plaintiff Mr. Johnson was very selective in how the "OFFICIAL NOTICE" was drafted. The word intend was chosen very carefully, for at the time Plaintiff Mr. Johnson drafted and mailed the February 15, 1994 letters to the IRS and the Defendant Mr. Killfoil the matter was still undecided. This is shown by the last statement in that letter, "As stated above, this is only an official notice of intent. This issue will be properly addressed by us in one form or another in the future." (V-1: 31)

The next incorrect referenced issue is on page 6 of Appellee's Brief. Defendants reference Defendant Ms. Wise's letter of March 7, 1994 to Plaintiffs stating: (1R. 5-6, 33.)

> Your letter stated that there was an attachment. There was no attachment received with your letter. If this attachment was your original 1988 return, we will need a newly signed copy of that return. If it was just a copy and the original was sent separately to be processed, please send us a copy so we may better answer your inquiry.

Then the Defendants continue referencing Ms. Wise's letter by stating, "Having apparently received no response to this request, the IRS treated the statement as "questioning the need for you to file a Federal income tax return for 1988 and subsequent years."" (1R. 34.) This is just another deliberate attempt by Defendants to depict Plaintiffs as being non-cooperative taxpayers. The fact is that the Plaintiffs did timely respond to Ms. Wise's March 7, 1994 letter. Even though the Plaintiff did not see the need to list their response letter as an exhibit, the Defendants did list the Plaintiffs letter as Defense Exhibit 10. Copy of letter from Plaintiffs to Defendant Wise dated March 13, 1994. (V-1: 115)

The next incorrect referenced issue is on page 7 of Appellee's Brief. Defendants reference Plaintiffs' 1993 Joint Tax Return filed on August 13, 1994 by stating that taxpayers/Plaintiffs requested a refund in the amount of $1,332.93. (1R. 6.) The Defendants go on to state, "The IRS applied the refund to Mrs. Johnson's 1988 tax liability. (1R.

37.)" The issue here is that the Plaintiffs did file their 1993 Joint Tax Return as stated, but did not request the over paid tax amount of $1,332.93 be refunded to them. The Defendants have once again failed to correctly state the facts of this case. The Plaintiffs correct statement of the fact in the "COMPLAINT" is as follows: (V-1: 6)

> "Fact 14.
> On August 13, 1994 we [Plaintiffs] filed our joint personal 1993 Income Tax Return, which showed we were due a refund of $1,332.93. We stated that the refund due us be carried forward to the 1994 tax year."

The IRS did not apply the $1,332.93 amount to the Plaintiffs tax year 1994. Instead, the IRS applied the entire $1,332.93 to Plaintiff Mrs. Johnson's 1988 tax case file. (1R. 37) After the IRS had applied the entire 1993 Plaintiffs' Joint Tax Return amount to Plaintiff Mrs. Johnson's tax case file, the IRS was still claiming an unpaid amount of $1,096.58 on the account - as of the notice date of September 26, 1994. (V-1: 37)

It is important to note here that the Plaintiffs had filed their 1988 Joint Tax Return back on February 16, 1994 - 6 months earlier, which should have nullified the IRS tax case file for Plaintiff Mrs. Johnson under her Social Security Number (SSN). This type of action was supported by an IRS employee named Ms. Hill on October 5, 1994, (V-1: 6 - Fact 15) and the subsequent IRS elimination of their tax case file on Plaintiff Mrs. Johnson (under her SSN) for the tax year 1988 on a date still unknown to Plaintiffs.

On Defendants Brief page 8 it is stated that: (D/E-Br: 8)

> "they [Plaintiffs] claimed jurisdiction under 28 U.S.C. §1346(a)(1) (action for recovery of taxes). (1R. 1.)"

The Plaintiffs felt from the start that their case was an excellent case to set a legal precedent for establishing the illegal actions of the IRS represented in the case as a true depiction of the term DOUBLE TAXATION. Also, 28 U.S.C. §1346(a)(1) is an excellent statute for establishing a Federal jurisdiction for all cases which have the same IRS accounting facts evident in this case. According to a strict written interpretation of this statute and the definition of DOUBLE TAXATION it is clear they can be very compatible. The first step in joining the term and the statute is to establish the true facts of the taxation.

According to the definition of Double Taxation it can only occur: 1st - two taxes must be imposed on the same exact property or item (such as a car, home or a person's wages), 2nd - the two governing bodies imposing the tax on the some property must be the same one (such as the IRS), 3rd - the tax period must be the same (such as a tax year), and 4th - the tax must be imposed for the same purpose (such as a personal income tax - IRS, or property tax, or school tax). Now if all four of these factors are present then accordingly a true Double Taxation will occur at the moment of collection pursuant to the definition. Next, there must be some type of law, statute, or code giving the government body the authority to impose and collect the tax.

The last catalyst for the joining of the term and the statute is the collection must not be in accordance with any law, statute, or code.

In leaving this issue Plaintiffs are well aware of why the Defendants and their counsel strongly oppose this issue in the case. But, again due to the criminal related facts this issue will effect, Plaintiffs can not further address this issue.

The Defendants made yet another incorrect reference on page 10. (D/E-Br: 10) Referring to the only, so called, hearing in the Lower Court on January 21, 1997 they made the statement:

> "(Mrs. Johnson apparently did not attend the hearing)"

The fact is that Plaintiff Mrs. Johnson did in fact attend the hearing and the U.S. Attorney Mr. Sobotka for the Defendants knew that. I will leave it to this Court to judge for itself why the Defendants would make such an incorrect statement.

The Defendants made a reference to the Plaintiff filing of an interlocutory appeal to this Court (No. 95-50083) addressing a discovery orders. (2R. 353) The Defendants also stated that "Taxpayers (Plaintiffs) do not contest the discovery orders in this appeal." (D/E-Br: 4) The Plaintiffs did not address the issue of that appeal due to the criminal issues addressed in the "Prelude". In leaving this issue Plaintiff Mr. Johnson wants to make it clear that this issue - above all others - was the one Plaintiffs wanted to argue, except for possibly the issue of Double Taxation.

The Plaintiffs purposed in their "Brief" that they had Jurisdiction under 28 U.S.C §1357 - Injuries under Federal Laws. (P/A-Br: 1,2,7,20) The Court must take notice that the Defendants failed to state any argument in opposition to this statute. Therefore, this Appeal Court must grant the Plaintiffs proper jurisdiction under this statute, along with all other just jurisdictional statutes.

PRAYER FOR RELIEF

Appellants/Plaintiffs pray that this Court REVERSE on all issues of final judgment of the District Court due to the lack of the Plaintiffs receiving their "Due Process" in the Lower Court, and direct the Lower Court to reinstate all the Plaintiffs' motions for proper procedural action and REMAND this cause for a trial on the merits, if the case survives to trial after proper administration of judicial procedures.

Respectfully submitted,

"/s______________________
William N. Johnson III
1710 East Oltorf, Apt. 737
Austin, Texas 78741-3839

"/s______________________
Emma G. Johnson
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Austin, Texas 78741-3839

CERTIFICATE OF SERVICE

I, William N. Johnson III, hereby certify that on this the 3rd day of February, 1998, the original and seven (7) copies of the foregoing Plaintiff's "Reply Brief Of Appellants" was filed - by U.S. Postal Service - with the United States Court of Appeals for the Fifth Circuit, and two (2) copies of the foregoing reply brief were sent by U.S. Postal Service to Sara Ann Ketchum, Assistant United States Attorney for the Dept. of Justice, Tax Division Appellate Section, P.O. Box 502, Washington, D.C. 20044.

"/s____________________
William N. Johnson III

NOTE - PETITION FOR WRIT OF CERTIORARI
Plaintiffs/Petitioners did sign the original document.

APPENDIX - L:

"STATUTE"
Federal Court Jurisdiction

TITLE 28 - UNITED STATES CODE
JUDICIARY AND JUDICIAL PROCEDURE

Ch. 85 - DISTRICT COURTS; JURISDICTION;

§ 1346. United States as defendant.

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

§ 1357. Injuries under Federal laws

The district courts shall have original jurisdiction of any civil action commenced by any person to recover damages for any injury to his person or property on account of any act done by him, under any Act of Congress, for the protection or collection of any of the revenues, or to enforce the right of citizens of the United States to vote in any State.